An Excess of Discretion? “Thayer’s Triumph” and the Uncodified Exclusion of Speculative Evidence

David S. Schwartz*

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INTRODUCTION

In an important article published in 2000, One Hundred Years of Evidence Law Reform: Thayer’s Triumph,1 Professor Eleanor Swift warned of a trend toward “an excess of trial court discretion in the application of evidence rules.”2 According to Professor Swift, this trend is particularly evident in the blurring of bright-line rules relating to hearsay and character evidence.3 This blurring results from a form of “discretionary thinking” that is not sufficiently

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* Foley & Lardner-Bascom Professor of Law, University of Wisconsin Law School. As one of many people who have benefited from Professor Swift’s mentorship, I’m delighted and honored to take part in this celebration of her achievements in academia. In my case, it was Eleanor who invited me into the field of Evidence scholarship. Early in my career, she introduced me to her coauthors Ron Allen and Dick Kuhns and facilitated my joining her casebook as a coauthor. See RONALD ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES (4th ed. 2006).

2. Id. at 2476.
3. Id. at 2463–66, 2468–71. Professor Swift also examined excessive discretion in the form of deference to trial courts under expert witness rules. See id. at 2466–68.
“guided”—that is, “restrained by standards articulated in the rules of evidence law.” This Essay takes Professor Swift’s warning and applies it to another possible area of excessive discretion in the application of an exclusion rule: a widely applied but uncodified rule excluding “speculation.”

Modern evidence law is based on codes that expressly deny courts discretion to create common law rules categorically excluding evidence. And yet, from all indications, the law of evidence includes a broad rule against “speculation.” It is the basis for a fundamental trial objection to evidence—“calls for speculation” or “speculative”—that is found in every checklist of trial objections. Courts exclude testimony they deem “speculative” typically without explaining what the term means or linking it to a codified evidence rule. Trial judges can rule whole lines of inquiry inadmissible as unduly “speculative.” And yet the term “speculation” does not appear in evidence codes.

The frequency with which “speculation” is used as a ground to exclude evidence makes the concept of speculation important in evidence law. Yet the concept is not adequately explained or theorized in case law, evidence treatises, or evidence scholarship. I offer this essay as a preliminary effort at gaining a more thorough understanding of what speculation is, how it tracks with the rules of evidence, and when it should and should not result in exclusions of evidence.

4. Id. at 2442, 2446.
7. See, e.g., Athridge v. Aetna Cas. & Sur. Co., 474 F. Supp. 2d 102, 105 (D.D.C. 2007) (“Testimony as to what the Rivases would have done had they been home the day of the accident is purely speculative. . . . and therefore shall not be admitted.”); Kennedy v. Adamo, No. 1:02CV01776-ENV-RML, 2006 WL 3704784, at *3 (E.D.N.Y. Sept. 1, 2006), aff’d, 323 F. App’x 34 (2d Cir. 2009) (excluding “[t]estimony by an injured party as to what he would have done only if something else had or had not happened” as “nothing more than ‘self-serving speculation’”).
8. See, e.g., State v. Allen, 342 S.E.2d 571, 572–73 (1986) (excluding evidence that “could do nothing more than create an inference or conjecture as to another’s guilt of the crime charged”).
I.

WHAT IS SPECULATION?

Definitions of “speculation” suggest that the term is an umbrella that covers several circumstances. Speculation is “not substantial evidence,” and is often “tied to the related concepts of ‘conjecturing,’ ‘guessing,’ or ‘surmising.’” Expert opinions are excludible when based on “mere conjecture or speculation” rather than “substantial information.” “Witnesses are not permitted to speculate, guess, or voice suspicions.” Juries may not award damages that are “remote, uncertain, or speculative,” or render civil or criminal verdicts based on speculation. At least one scholar has claimed, with some support in the case law, that there is a policy against criminal acquittals based on speculation. All these applications more or less track the dictionary definition of “speculation,” which is the formation of a belief based on inadequate evidence.

In sum, “speculation” is held to be an undesirable trait in the presentation of evidence that justifies exclusion. The danger in failing to analyze the concept in greater depth is that unwarranted exclusions may result simply because the label “speculation” sticks to the offered evidence. It is therefore worth knowing why we tend to call certain types of evidence speculative and considering whether all these types are categorically excludible.

12. United States v. Whittemore, 776 F.3d 1074, 1082–83 (9th Cir. 2015) (internal quotation and citation omitted).
14. See, e.g., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 5.1 (2016) (“Your award must be based upon evidence and not upon speculation, guesswork or conjecture.”); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 3.11 (2014) (“Reasonable doubt is doubt based upon reason and common sense, and not doubt based on speculation.”).
15. David McCord, “But Perry Mason Made It Look So Easy!”: The Admissibility of Evidence Offered by a Criminal Defendant to Suggest That Someone Else Is Guilty, 63 TENN. L. REV. 917, 976–77 (1996); see also MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS, supra note 14, at 3.11 (stating that reasonable doubt is not “based on speculation”). For a critique of this position, see Schwartz & Metcalf, supra note 5, at 398–401.
16. Speculate, OXFORD AMERICAN DICTIONARY OF CURRENT ENGLISH 779 (1999) (“Speculate” means “form a theory or conjecture, esp. without a firm factual basis.”); BLACK’S LAW DICTIONARY (5th ed. 1979) (“theorizing about a matter as to which evidence is not sufficient for certain knowledge”).
II.
FOUR PATTERNS OF “SPECULATIVE EVIDENCE”

The various circumstances giving rise to an argument about “speculative evidence” fall into four overlapping but distinct patterns: (1) improper opinions; (2) predictions and counterfactual assertions; (3) excessive inferences; and (4) judgment as a matter of law. As discussed below, the first three can each be linked to, and are best understood as, applications of one or more codified evidence rules. The fourth is the analogous application of the principle of evidentiary sufficiency to claims rather than individual items of evidence.

A. Improper Opinions

Testimony about what another person was thinking or feeling is a frequently recurring example of “speculative” evidence. While testimony about another’s mental state may indeed be speculative, this use of the term “speculation” substitutes a conclusionary label for a clear analytical path, and wrongly implies that such testimony is always inadmissible. For example, one court states categorically that “an opinion on what someone else was thinking at a specific time” is necessarily “a speculative opinion” that “does not help the jury to either (1) understand the witness’s testimony better, or (2) decide the question of the other person’s intent. Mere conjecture does not assist the jury.”

Contrary to that implication, evidence of another person’s state of mind is simply a type of potentially admissible opinion evidence that is best analyzed under Federal Rule of Evidence (FRE) 701 and its state law analogues—the rules governing lay opinion. Under these rules, admissible lay opinions must be both “rationally based on the witness’s perception” and “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” Calling an opinion on another’s state of mind “speculative” is merely an imprecise way of suggesting that one of these two factors is absent. But where both are present, such testimony can be admissible. State of mind is virtually always proved circumstantially, and a witness may well have firsthand knowledge (“perception”) of circumstantial facts sufficient to support an inference of another person’s mental state. For instance, we all draw rational

18.  Bd. of Trs. of the Fire & Police Retiree Health Fund, 191 S.W.3d at 193.
19.  FED. R. EVID. 701(a), (b).
perception-based inferences about other people’s emotions every day. In some cases, it may be helpful to the jury to allow the witness to say another person “seemed angry” or “looked happy” rather than requiring the witness to limit himself to more granular details (e.g., he stomped around the room, was red in the face, etc.). The analysis, assuming firsthand perception, will depend heavily on the witness’s narrative abilities and the risk that the jury will lose relevant information if the opinion is excluded.20 Here, the label “speculation” offers little analytical assistance and tends to obscure the fact that the opinion may be admissible.

This point extends to all opinions, both lay and expert, and not just those involving mental states of other persons. The “speculative” label will tend to stick when there are gaps in knowledge (firsthand knowledge, in the case of lay witnesses) underlying the witness’s opinion. But the admissibility of the opinion should be analyzed according to the codified rules governing appropriate knowledge: FRE 602 and 701 for lay witnesses, and FRE 702 and 703 for experts. These rules do a better job than the vague “speculative” label in directing us to relevant lines of case law and to the factors that should guide the admissibility inquiry: personal knowledge in the case of lay witnesses, and reliability factors in the case of experts.

B. Predictions and Counterfactuals

Objections to “speculative” evidence also crop up where the evidence involves hypothetical future occurrences or counterfactuals. In the words of one court, “[t]estimony by an injured party as to what he would have done only if something else had or had not happened is nothing more than ‘self-serving speculation.’”21 Yet it is clear that such evidence of counterfactuals like this cannot be categorically inadmissible. The very notion of making a plaintiff whole in civil cases presupposes evidence of counterfactual states of the world: what position the plaintiff would have been in had the defendant not breached the contract, committed the tort, and the like.22 To the extent that remedies are forward-looking, predictions also naturally come into play. Lost profits or lost earnings necessarily compare future states with and (counterfactually) without the breach.23

20. See ALLEN ET AL., supra note 6, at 704.


22. See, e.g., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS, supra note 14, at 13.1 (Damages in wrongful discharge case “is the amount that the plaintiff would have earned from employment with the employer if the discharge had not occurred.”).

23. See, e.g., Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1405–08 (9th Cir. 1993) (holding that to establish damages under the lost profits method in trademark infringement case, plaintiff must make prima facie showing of reasonably forecast profits).
Once again, the label “speculation” is not analytically helpful beyond merely flagging a problem that the evidence is often thin in this type of circumstance. But it is not always thin: evidence of past conditions and behaviors, of a person’s habits and intentions, is certainly relevant to making counterfactual judgments and future predictions, and may suffice to meet the relevant burden of production.

C. Excessive Inferences

Evidence is sometimes excluded as “speculative” because it is seen as requiring excessive inferences on the part of the fact finder in order to be probative. Such speculative evidence can take two different forms: it might involve an assertion that requires an excessive inferential step in order to be relevant; or it might involve an assertion that something is possibly, rather than probably, true.

Consider a car accident case, in which the plaintiff claims that the defendant negligently failed to inquire into the dangerous condition of her car—faulty brakes—shortly before causing the accident. As proof of notice, the plaintiff offers testimony of the bookkeeper at the car repair shop. “The mechanic told me that the defendant’s car had bad brakes. I can’t remember whether the defendant was present in the repair shop or not.” The plaintiff offers this testimony as evidence of notice, i.e., that the defendant knew her car had the dangerous condition. It would be consistent with judicial practice for a court to exclude this testimony as “speculative” because the jury would have to supply a missing fact—that the defendant heard the mechanic’s statement—in order to use it toward proof of a consequential fact (here, notice).

Note that the problem can, and probably should be analyzed as one of “conditional relevance” under FRE 104(b): the testimony will be relevant and admissible only if there is “evidence sufficient to support a finding” of the fact condition, that the defendant heard the statement. As I have previously argued, this is fundamentally a foundation problem that can also be analyzed under FRE 901(a).24 There is not “evidence sufficient to support a finding” that the offered item of evidence (the bookkeeper’s testimony) is what the proponent claims it is (evidence of notice).

The offering party might try to scale down the claim: “Your honor, we don’t claim that this is evidence that the defendant probably had notice, but only that the defendant possibly had notice.” This move should be unavailing. A court would still be right in saying that the jury is being asked to “speculate” about whether the defendant actually got notice or not. A rule-based analysis might say that the evidence is not relevant under FRE 401, because the mere possibility that the defendant received notice existed even without the offered evidence—that possibility is not affected by having a witness point it out. For

that reason, I have argued that foundation is a precondition of relevance, and as a corollary, that relevant evidence must entail the assertion of a probably true fact, not merely a possibly true one.\textsuperscript{25}

All this is to say that “speculation” is a lack of foundation. This point summarizes the previous two types of speculative evidence as well: improperly “speculative” opinions, predictions, and hypotheticals are those that have factual gaps, such that their relevance requires the jury to supply missing facts.\textsuperscript{26} The Federal Rules of Evidence supply four foundation rules pertinent here: FRE 602, 701, 901, and 104(b). In addition, evidence lacking foundation is necessarily irrelevant under FRE 401. All of the foregoing types of “speculation” problems are better analyzed under one or more of these rules rather than treating “speculation” as a judge-made category of exclusion.

\textbf{D. Judgment as a Matter of Law}

A jury might be asked to make excessive inferences not only to determine the relevance of an item of evidence, but also to find that several items of evidence meet the offering party’s burden of proof. Courts frequently apply the label “speculation” when considering judgment as a matter of law (JMOL) to indicate that a party has failed to meet its burden of production. The evidenced facts are insufficient and can only be made up through “speculation,” that is, the trier of fact’s filling in the gaps with unevidenced factual hypotheses or dubious generalizations.

The connection between foundation and JMOL should hardly be surprising. The concept of JMOL is a logical extension of the concept of foundation or conditional relevance from an individual item of evidence to a whole claim (or element of a claim). Or it could be said the other way around: the foundation inquiry is simply the JMOL inquiry on a smaller scale.\textsuperscript{27}

But there remains an unanswered question, one that Evidence scholars could help to solve: What is the proper place of speculation by the trier of fact in adjudicative fact-finding? An unreflective answer to that question is that triers of fact should never speculate. Yet on further reflection, that answer can’t be right. A fundamental principle of our system is that defendants, civil or criminal, are not required to come forward with evidence: the burden of proof is on the plaintiff or prosecutor. In criminal cases, the right of the defendant not to produce evidence is of constitutional dimension.\textsuperscript{28} A corollary of this principle is that fact finders must be allowed to speculate when rejecting a

\textsuperscript{25} See id. at 122–24.

\textsuperscript{26} When I speak of missing facts here, I mean to include both case-specific facts (e.g., “the defendant was present within hearing distance of the mechanic’s statement”), as well as generalizations about the world that are either doubtful (e.g., “civil defendants have super-human hearing when it comes to comments on their cars”) or beyond common knowledge (“PCBs cause leukemia”).

\textsuperscript{27} Schwartz, supra note 24, at 133–34.

\textsuperscript{28} See Schwartz & Metcalf, supra note 5, at 397 & n.234.
claim or criminal charge for failing to meet the burden of proof: that the defendant is not liable or guilty, based on some set of facts for which evidence has not been produced. “‘Doubt’ is by nature a form of speculation.” Yet “speculation” has such a negative connotation in our court system that courts have overlooked this important respect in which a defendant has a right to benefit from speculation by the trier of fact. Nowhere has this issue become more pointed than in the judge-made doctrine that evidence of third-party perpetrators in criminal cases may be excluded if it is “speculative.”

CONCLUSION

It hasn’t been possible in this short space to attempt a comprehensive theory of speculation. This short sketch has offered two principal arguments. First, speculation is most accurately defined as the thought process of substituting generalizations or factual hypotheses for facts that are missing or unsupported by evidence. Second, speculation should be analyzed as a foundation problem under one or more of the codified Federal Rules of Evidence.

But this is only the start of the analysis. A question for judges and evidence scholars remains: How large an inference is “excessive,” warranting the exclusion of so-called speculative evidence? Putting it another way, how much filling in of facts by the trier is too much? At present there appear to be no standards for answering this question. Courts resolve it with gut feelings.

Professor Swift’s argument in Thayer’s Triumph suggests that the absence of guiding standards in evidence law widens discretion, and discretion of the worst type. A subtheme of Thayer’s Triumph is the important observation that evidence scholars have had a tremendous impact on the development of evidence law. Grappling with the difficult question of standards for the exclusion of “speculative” evidence is well worth the effort of evidence scholars.

29. See id. at 399.
30. See id. (criticizing this doctrine).
31. See Schwartz, supra note 24, at 125.