

BURDENS WITHIN BURDENS AT A TRIAL WITHIN A TRIAL

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When evidence is offered and a proper objection is made,¹ the issues raised by the objection normally must be resolved before the evidence is admitted.² The law of evidence requires a determination of the existence of conditions precedent before the admission or exclusion of the proffered evidence.³ A decision on the existence of these conditions often requires preliminary factual determinations as well as the application of a legal standard.⁴ For example, before a proffered witness may testify in the form of an expert opinion, a decision must be made whether he is sufficiently qualified by training or experience to give such testimony.⁵ A ruling must also be made if there is a question of the applicability of the hearsay rule or one of its exceptions.⁶ In practical terms, the evidence will be admissible only if the proper foundation is established.⁷ This process of determining facts and applying standards has been called "a trial within a trial."⁸

Whenever there is a dispute over preliminary facts governing the admissibility of evidence, an allocation of the burdens of proof is made. Since the allocation often determines whether the evidence is admitted, it may affect the outcome of the case. In addition, the allocation decision should foster, rather than hinder, the policies reflected in the governing rules of evidence. For these

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¹ See FED. R. EVID. 103(a)(1); 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 18 (3d ed. 1940 & Supp. 1981). See generally 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5036 (1977 & Supp. 1981) (objections must be: specific, timely, and of record).

² See FED. R. EVID. 104. Subdivision (a) assigns to the judge the determination of certain preliminary questions "subject to the provisions of subdivision (b)." Subdivision (b) permits the judge to admit evidence "subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition" upon which relevancy depends.

³ See FED. R. EVID. 104(a), advisory committee note ("The applicability of a particular rule of evidence often depends upon the existence of a condition. [For example,] [i]f the alleged expert is a qualified physician? . . . [T]he admissibility of the evidence will turn upon the answer to the question of the existence of the condition."); R. CROSS, EVIDENCE 58 (4th ed. 1974) ("There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury" e.g., oath and competency are conditions precedent to admitting *viva voce* evidence.).

⁴ See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 53 (2d ed. 1972 & Supp. 1978).

⁵ See FED. R. EVID. 702. See generally Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952) (general discussion of expert testimony).

⁶ See FED. R. EVID. 801-804.

⁷ See generally E. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 2 (1980) (practical guide to establishment of foundations for admissibility).

⁸ R. CROSS, *supra* note 3, at 58.

reasons, it is important that allocation be a conscious decision and not the mere result of unquestioned habit.

Unlike several other procedural issues in preliminary fact disputes,⁹ the question of how burdens of proof are to be allocated when preliminary issues of fact are in dispute has not frequently been discussed. This question has been obscured for a number of reasons. As the law of evidence developed, the primary concern was the development of the governing rules themselves, and relatively little attention was given to their procedural implementation.¹⁰ To the extent procedure was considered, more obvious procedural issues came more rapidly into focus.¹¹ Further, the admission of evidence is an area traditionally within the broad discretion of the trial judge.¹² Finally, the process, which normally occurs quickly,¹³ is subject to both habit, and to the quality of advocacy by lawyers prepared to support or oppose the admission of evidence.

⁹ See, e.g., F. JAMES & G. HAZARD, CIVIL PROCEDURE § 1.1, at 2-4 (2d ed. 1977) (The law of procedure serves as a model of dispute-resolution technique.). It must be decided, for example, who will make the final decision on admissibility, the judge or the jury. 9 J. WIGMORE, *supra* note 1, § 2550 (Chadbourn rev. 1981). The traditional view is that the judge serves as fact-finder in the determination of preliminary questions. Supporters of this view have reasoned that when the judge decides preliminary fact questions, simplicity in procedure, consistency of rulings, protection from prejudice, and precision in reviewability are all facilitated. Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392, 393-94 (1927). See also Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929).

The traditional view has been adopted by recent codifications of the rules of evidence. See FED. R. EVID. 104(a) (Preliminary questions concerning "the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the [conditional relevancy] provisions of Rule 104(b)."); CAL. EVID. CODE §§ 403, 405 (West 1966). See also MCCORMICK, *supra* note 4, § 53; Kaplan, *Of Mabrus and Zorgs — An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987 (1978); Laughlin, *Preliminary Questions of Fact: A New Theory*, 31 WASH. & LEE L. REV. 285, 286-88 (1974).

Another issue is whether the rules of evidence should apply in determining what evidence may be considered in making these preliminary determinations. An uneasy consensus seems to have been reached that they do not. See, e.g., FED. R. EVID. 104(a) (determination of preliminary fact questions not governed by the rules of evidence, except those relating to privilege). See also 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 35, at 266-67 (1980). See generally, Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101, 1101-03 (1927) (discussing prior authorities).

A third question concerns the appropriate standards of persuasion. Despite cogent criticism, the traditional rule that admissibility, even over a constitutional objection in criminal cases, is determined by a preponderance of the evidence seems to retain its vitality. See *United States v. Raddatz*, 447 U.S. 667, 678 & n.5 (1980); *Lego v. Twomey*, 404 U.S. 477, 486-87, 487 n.15 (1972); Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

¹⁰ Cf. Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101, 1103 n.8 (1927).

¹¹ See *supra* note 9.

¹² See McElroy, *Some Observations Concerning the Discretions Reposed in Trial Judges by the American Law Institute's Code of Evidence*, in MODEL CODE OF EVIDENCE 356, 360-64 (1942); 1 J. WIGMORE, *supra* note 1, § 16. See generally R. BOWERS, THE JUDICIAL DISCRETION OF TRIAL COURTS (1931); Abbott, *The Principles of Evidence*, 1 UNIV. L. REV. 25 (1893); 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5215.

¹³ See Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101, 1125 (1927). But see, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*,

In jury trials, errors in assigning the risk of non-persuasion on ultimate issues of fact come to light only because the risk is explicitly assigned in the court's instruction to the jury.¹⁴ In bench trials, reversals on this ground are avoided unless the trial judge makes the assignment explicit.¹⁵ In part for the same reason, the placement of the risk of non-persuasion in preliminary matters often evades review.¹⁶ The implicit nature of the process, and the infrequency of focused appellate review, have resulted in inadequate consideration of important questions. Since, however, the allocation of burdens of proof in determinations of preliminary facts is crucial to the admission or exclusion of evidence, it is important to examine both how such allocations have been made in the past, and how a rational system can be developed to make such allocations in the future.

This article is an analysis of the bases for allocating the burdens of proof in disputes over the admissibility of evidence. First, an analysis of the burden of proof as it has developed in the context of substantive law is presented. Then, there will be a discussion of the evolution of the factors which have been identified as affecting the assignment of the burden, and an adaptation of those factors to the procedure for resolving preliminary questions. The article concludes with an evaluation of allocations made under selected provisions of the Federal Rules of Evidence in the context of these principles. It will be argued that a principled basis for allocating burdens of proof on preliminary questions can be developed from the principles used to explain the allocation of burdens of substantive law questions. These principles can then be applied to the Federal Rules of Evidence, and a systematic method of making such allocations can be devised.

I. BURDENS OF PROOF IN SUBSTANTIVE LAW

Two separate concepts are incorporated in the term burden of proof — the burden of persuasion and the burden of production.¹⁷ The burden of persuasion is relevant only at the time the fact-finder makes his ultimate decision,¹⁸

505 F. Supp. 1313 (E.D. Pa. 1980, as amended 1981) (pretrial evidentiary rulings); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190 (E.D. Pa. 1980); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125 (E.D. Pa. 1980).

¹⁴ See F. JAMES & J. HAZARD, *supra* note 9, § 7.6 at 243 n.8 (although the judge in deciding an issue should apply the same guides as would be prescribed for a jury, without a recorded charge there is no way to ensure this procedure is followed).

¹⁵ *Id.*

¹⁶ Perhaps, as in nonjury trials, it would be better to avoid articulation, and simply to apply "a common sense test." Cf. F. JAMES & J. HAZARD, *supra* note 9, § 7.6, at 243 n.8. But, since the allocation affects as well as reflects the law of evidence, it is worthy of analysis. See *supra* text and notes at notes 8-9.

¹⁷ J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, 355 (1898).

¹⁸ Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1300 n.3 (1977) (distinction between burden of persuasion and burden of production usually attributed to Thayer). See J. THAYER, *supra* note 17, at 355.

"when all is said and done."¹⁹ It is a rule of decision holding that, when the fact-finder remains in doubt about the truth of the disputed proposition after hearing all admissible evidence, it must decide the fact against the party bearing the burden.²⁰ The burden of production, on the other hand, is merely the duty to produce some evidence on an issue,²¹ at the risk of an adverse decision if no such evidence is introduced.²² The burden of production is merely a procedural device that identifies which party must come forward with evidence at any given time, enabling the judge to decide if there is a sufficient basis for a jury verdict.²³

The burden of production is not relevant when the judge is the fact-finder, because there is no reason to ask whether there is sufficient basis for a jury verdict.²⁴ When there is a single fact-finder, the judge, the issue of the sufficiency of the evidence to support a certain decision is not divorced from the issue of whether the fact-finder is actually persuaded of the existence of the disputed matter. In the context of admissibility decisions, the judge, as decider of these preliminary questions, must be persuaded of the existence of the conditions for admission, or exclusion, of the proffered evidence.²⁵ Although the party bearing the burden of persuasion must, of course, produce evidence to meet his burden, his duty to produce evidence is not really a burden of production, but rather is incidental to his burden of persuasion.²⁶ The focus of concern in this

¹⁹ J. THAYER, *supra* note 17, at 355.

²⁰ *Id.* See also C. MCCORMICK, *supra* note 4, § 336.

²¹ See Underwood, *supra* note 18, at 1300 n.3.

²² W. BEST, *THE PRINCIPLES OF THE LAW OF EVIDENCE* § 268 (Phipson ed. 1922), (citing *Amos v. Hughes*, 174 Eng. Rep. 160 (1835)). See also F. JAMES & J. HAZARD, *supra* note 9, § 7.7, at 245; J. THAYER, *supra* note 17, at 355.

²³ See 9 J. WIGMORE, *supra* note 1, § 2487 at 293 (Chadbourn rev. 1981). Wigmore built on Thayer's foundation. He identified the burden of production as the duty to produce evidence to the judge. *Id.*

The burden of production is a function of judicial control over the jury, that is, that a party must produce evidence sufficient for a reasonable jury to find in his favor. See Cleary, *Presuming and Pleading: An Essay in Juristic Immaturity*, 12 STAN. L. REV. 5, 15-16 (1959). Since the judge decides whether the burden of producing evidence has been satisfied, he has effective control over the jury. *Id.* at 16. See also F. JAMES & J. HAZARD, *supra* note 9, § 7.7, at 246 (in allocating burden of production, judge controls jury by pre-screening the case); J. MAGUIRE, *EVIDENCE, COMMON SENSE AND COMMON LAW* 175-76 (1947).

²⁴ See McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1385 (1955). Since the party with the burden of persuasion will lose if the factfinder is in doubt at the moment of decision, he usually must start the process of persuasion. See C. MCCORMICK, *supra* note 4, § 337. In some cases, the burdens of persuasion and production are allocated separately. Affirmative defenses in criminal cases are often interpreted to mean that, while the defendant has a burden of production, the prosecution retains the burden of persuasion. See J. THAYER, *supra* note 17, at 382-83, & 383 n.2, (citing *Davis v. United States*, 160 U.S. 469 (1895) (insanity defense)). Professor Cleary noted that presumptions are devices to alter the burden of production, and sometimes to assign it differently from the burden of persuasion. See Cleary, *supra* note 23, at 16.

²⁵ In some instances questions of preliminary fact are expressly committed to the jury. See FED. R. EVID. 104(b), 602, 901(a), 1008.

²⁶ See Stone, *Burdens of Proof and the Judicial Process*, 60 L.Q. REV. 262, 265 (1944). See also F. JAMES & J. HAZARD, *supra* note 9, § 7.7, at 249 ("concept of a production burden will be

article, therefore, is the risk of non-persuasion of the existence of conditions precedent to evidentiary rulings.

II. BASES FOR BURDEN ALLOCATION IN SUBSTANTIVE LAW

The guiding principles for allocating the burden of proof in the sense of deciding which party bears the risk of non-persuasion on ultimate issues of fact have been articulated in varying ways.²⁷ Wigmore's conclusion was that allocation of burdens on substantive questions was "merely a question of policy and fairness based on experience in the different situations."²⁸ Morgan and McCormick brought their formidable talents to bear on the issue of allocation without much more precision.²⁹ Morgan did indicate that in allocating the burden of persuasion, courts should be guided by reasons of substance and policy and that "no mere dogma should be given the slightest consideration, no matter how high its source or how often it has been repeated."³⁰ Each also alluded to precedent. Morgan indicated that "prior judicial experience, as

fully applicable in cases tried to a judge without a jury," since the tribunal has no responsibility to acquire the materials for decision).

²⁷ Thayer correctly considered the question primarily one of substantive law, and perhaps also one of the law of procedure generally, rather than one of evidence. J. THAYER, *supra* note 17, at 388-89. Since the allocation of the burden of persuasion will determine which party prevails when the decisionmaker is in doubt, the allocation is as substantive a decision as the recognition of a right to recovery in the first place. *See supra* text and notes at notes 18-22. When the burden of production is assigned to a party, that assignment makes recovery more difficult, and therefore should reflect the substantive preference for one result over another. *See* Underwood, *supra* note 18. Thayer made an eloquent, but hitherto unrequited plea that the law of evidence be relieved of the burden of the topic of the burden of proof. J. THAYER, *supra* note 17, at 389. *See also* Cleary, *supra* note 23, at 10. While Thayer's position is correct on burdens of substantive issues, it cannot be doubted that the law of evidence must address the issue of burdens of proof in preliminary matters. It is the law of evidence which establishes the preference for or against admission of the proffered evidence.

²⁸ 9 J. WIGMORE, *supra* note 1, § 2486, at 291 (Chadbourn rev. 1981). The allocation of burdens should have a principled basis, whether the assignment is explicitly made by the legislature, or by the court. When the court makes the allocation, the express or implied legislative preference itself becomes one of the bases for decision. When the legislature makes the assignment, it should consciously do so, considering the reasons for it. *See infra* text and notes at notes 33-59.

²⁹ C. MCCORMICK, *supra* note 4, § 337; E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE, Chapter Two (J. Weinstein 5th ed. 1976).

³⁰ E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 70-71 (1956). Both Morgan and McCormick dismissed the argument that the burden of proof should follow the burden of pleading. Morgan found correlating the burden of persuasion with the burden of pleading helpful only where available precedents established the pleading rule. *Id.* at 75. In addition, since modern pleadings often end with the answer, Morgan found this linkage of the burden of persuasion with the burden of pleading unrealistic since many issues are not revealed by the pleading. *Id.* McCormick agreed that tying the burden of proof to the burden of pleading was unsatisfactory. C. MCCORMICK, *supra* note 4, § 337, at 785-86. Bases for the allocation of the burden of pleading were stated classically by Judge Charles Clark in his text on pleading. C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 96, at 608-09 (2d ed. 1947). Clark indicated that assignment of the responsibility for pleading is based upon policy, convenience and fairness. *Id.*

revealed in past decisions, has strong persuasive effect."³¹ McCormick, in contrast, had less respect for precedent, saying that assignment of burdens is partly the result of "merely traditional happen-so."³²

The most influential analysis of the reasons influencing the allocation of the burden of persuasion is Professor Edward Cleary's "Presuming and Pleading, An Essay on Juristic Immaturity."³³ Cleary criticized the approach of courts that assign the burdens of proof on the basis of the statutes creating the right of action, on the ground that they were frequently phrased without concern for their procedural consequences.³⁴ He rejected this "purely mechanical approach" as too "accidental," since legislators frequently do not intend to allocate the burden of proof by their choice of language.³⁵ Next, Professor Cleary rejected reliance on precedent, since "precedent as such does nothing for the inquiring mind."³⁶ Cleary also rejected two other analytical clichés of burden allocation.³⁷ That a party asserting the affirmative of a proposition bears the burden of demonstrating it is a time-honored and time-worn principle of debate.³⁸ Since either the affirmative or the negative of any proposition can be affirmatively asserted, any student of logic or language can easily mock this principle.³⁹ Even more easily refuted is the cliché that the burden rests upon the party to whom the proposition is essential, since that resolution, in McCormick's phrase, simply "restates the question."⁴⁰

After clearing the land, Cleary sowed the principles which subsequent commentators have reaped.⁴¹ When a governing statute makes an allocation of

³¹ E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 21 (J. Weinstein 5th ed. 1976).

³² C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 318, at 674 (1954). See also C. MCCORMICK, *supra* note 4, § 337, at 786 ("[Assignments of burdens] owe their development partly to traditional happen-so and partly to considerations of policy.").

³³ CLEARY, *supra* note 23.

³⁴ *Id.* at 8-9. Cleary illustrated this point by contrasting the procedural effects of a Massachusetts statute with a Kentucky statute. Both statutes made a dog owner liable for all injuries caused by his dog and prohibited recovery only if the person had been injured under designated circumstances while engaged in unlawful activity. Judicial interpretation of the Massachusetts statute resulted in a two-year-old child plaintiff being assigned the burden of proving that he had not been tormenting the dog. On the other hand, the Court of Appeals of Kentucky held that the Kentucky statute allocated to the plaintiff the mere burden of showing that he had been bitten by the defendant's dog; thus the burden of proof of plaintiff's nighttime presence or illegal daytime activity on the dog owner's land was on the defense. *Id.* at 8-9.

³⁵ *Id.* at 8.

³⁶ *Id.* at 10.

³⁷ *Id.* at 11.

³⁸ See W. WILHOFT, MODERN DEBATE PRACTICE 128-29 (1931).

³⁹ *Id.* The rule requiring a party who pleads the affirmative on a particular fact issue to bear the burden of proving that proposition has been severely criticized. The rule implicitly allows a party to control the allocation of the burden of proof by framing his averment in the negative. See F. JAMES & J. HAZARD, *supra* note 9, § 7.8, at 249-50; C. MCCORMICK, *supra* note 4, § 337, at 786 (rule unduly emphasizes what is essentially a matter of form); Cleary, *supra* note 23, at 11 (rule is mere play on words).

⁴⁰ C. MCCORMICK, *supra* note 4, § 337, at 786. See Cleary, *supra* note 23, at 11.

⁴¹ See, e.g., *Grumman Aerospace Corp. v. United States*, 579 F.2d 586, 594 n.16 (Ct.

the burdens of proof, of course it must be obeyed.⁴² Many statutes, however, do not explicitly allocate burdens; when they do not, the courts must make the allocation.⁴³ In making this decision, the courts should have guidelines. The guidelines urged by Cleary are policy, fairness and probability.⁴⁴

Cleary characterized this trio of considerations as containing "some real meaning," "despite the vagueness of their generality."⁴⁵ The policy consideration requires allocating burdens in such a way as to favor "one or the other party to a particular kind of litigation, thus discouraging the making of a disfavored claim."⁴⁶ The approach of the courts to the obsolescent question of contributory negligence is illustrative. Proof of the plaintiff's contributory negligence can be an affirmative defense or proof of its absence can be an element of the plaintiff's case in chief. The latter assignment disadvantages the plaintiff, while the former weights the scales against the defendant. Thus, the court affects relief by allocating the burden of proof.⁴⁷ Fairness, Cleary's second consideration, is illustrated by the notion that when evidence of a proposition is more within the control of one of the parties, that party should have the burden of presenting it.⁴⁸ For example, in an action for debt, a defense of payment is normally characterized as affirmative,⁴⁹ which means that the defendant bears the burden.⁵⁰ One justification for that allocation is that if payment had been made, the person who made it is more likely to have access to evidence which will prove it.⁵¹ Finally, probability is a factor governed by a judicial ("i.e. wholly nonstatistical")⁵² estimate of probable factual circumstances, with the consequential placing of the burden on the party urging that the instant facts depart from the probable circumstances.⁵³

Cleary illustrated the process of judicial probability analysis with several

Cl. 1978); Nelson v. Hughes, 290 Or. 653, 625 P.2d 643, 645-46 & 646 n.5 (1981); 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 300[02] n.4 (1981); Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 299 & n.103 (1962); Dworkin, *Easy Cases, Bad Law, and Burden of Proof*, 25 VAND. L. REV. 1151, 1172 (1972); Epstein, *Pleading and Presumptions*, 40 U. CHI. L. REV. 556, 572-82 (1973); Shuman, *The Road to Bedlam: Evidentiary Guideposts in Civil Commitment Proceedings*, 55 NOTRE DAME LAW. 53, 68 (1979).

⁴² See Cleary, *supra* note 23, at 8.

⁴³ *Id.* at 10.

⁴⁴ *Id.* at 11.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* See also W. PROSSER, LAW OF TORTS § 65, at 416-17 (4th ed. 1971).

⁴⁸ Cleary, *supra* note 23, at 12.

⁴⁹ See FED. R. CIV. P. 8(c).

⁵⁰ See C. MCCORMICK, *supra* note 4, § 337, at 786-87; *id.* § 346, at 830-31.

⁵¹ See Cleary, *supra* note 23, at 12. The authors of McCormick's second edition note that greater pretrial discovery weakens the importance of this consideration. See C. MCCORMICK, *supra* note 4, § 337, at 787 n.19.

⁵² Cleary, *supra* note 23, at 12.

⁵³ *Id.* at 12-13. McCormick illustrated this consideration with the example that, in a business relationship, it is unlikely that a service will be performed for free, therefore the burden of proving a gift in that context is placed upon the party asserting it. On the other hand in a family situation, a gratuitous service is considered more likely, and the burden of proving the right to compensation is upon the party claiming it. See C. MCCORMICK, *supra* note 4, § 337, at 787.

examples. Guest statutes prohibit recovery for mere negligence of the driver by a non-paying passenger.⁵⁴ If most automobile passengers are non-paying, then the passenger-plaintiff should bear the burden of showing compensation. If most pay, then showing plaintiff's non-payment should be required of the defendant as an affirmative defense.⁵⁵ In effect, the burden of proof should be allocated to the party asserting that the instant facts differ from the norm. Cleary urged that the same analysis be applied to allocations of the burden of proof when the events a party seeks to establish have occurred after a plaintiff's rights have accrued.⁵⁶ Examples of such events are the payment or release of a debt, or the running of the statute of limitations. These are usually affirmative defenses, on which the burden of proof has been placed on the defendant. This assignment, in the case of later events, Cleary argued, was based on the assumption "that a condition once established is likely to continue."⁵⁷ Consequently, the burden should fall on the party asserting that the condition has changed.⁵⁸ Cleary argued that such an appropriate use of probability would work the least injustice, since it effectively creates a presumption that the most likely factual circumstances did in fact occur.⁵⁹

Professor Cleary advanced these three principles, policy, fairness and probability, as guidelines for allocating the burdens of proof, when no assignment has been made by statute. Despite their apparent vagueness, these terms can be given some precise content. When viewed in terms of the substantive explanations provided by Professor Cleary, these principles clearly serve as a comprehensive and rational method for allocating burdens of proof on substantive law questions.

III. PREVIOUS TREATMENT OF BURDEN ALLOCATION IN PRELIMINARY DETERMINATIONS

No analysis such as Cleary's has been applied to the allocation of burdens of production and persuasion in preliminary determinations of fact governing the admissibility of evidence. This area, in effect, is in the same state of juristic immaturity in which Cleary found allocations in substantive questions over twenty years ago. Wigmore only briefly addressed the question, and early codifications of the law of evidence only provided confusing⁶⁰ or vague⁶¹ rules. At present, the trial judge's discretion, the concomitant paucity of appellate

⁵⁴ See, e.g., 13 W. DORSANEO, TEXAS LITIGATION GUIDE § 301.01 (1981).

⁵⁵ Cleary, *supra* note 23, at 13.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 13-14. But see Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 817-18 (1961) (party challenging the odds doubly disadvantaged, once by the burden allocation, and again by jury estimation).

⁶⁰ See *infra* text and notes at notes 72-75.

⁶¹ See *infra* text and notes at notes 76-88.

review, and the nature of the process of ruling on objections have combined to obscure the allocation issue. Participants only occasionally address the question at all, and its resolution is at best common-sensical, and at worst, merely habitual. The same light which Cleary shed on substantive principles must find its way to the procedure of resolving admissibility disputes.

Wigmore made only a terse conclusory comment on the allocation of the burden of proof in disputes concerning the admissibility of evidence.

[T]he burden of establishing the preliminary facts essential to satisfy any rule of evidence is upon the party offering it. The opponent merely invokes the law; if it is applicable to the evidence, the proponent must make the evidence satisfy the law.

To this general rule, there are a few exceptions, based (like all solutions of the burden of proof) on experience and convenience in special classes of cases.⁶²

In this short, uncharacteristically unfootnoted passage, Wigmore disposed of the issue. By placing the burden upon the proponent of the evidence Wigmore, in effect, adopts an anti-admissibility posture. Such a position is based upon the assumption that the law of evidence is a barrier to proof, which must be surmounted before information can be presented to the fact-finder. This exclusionary bias, however, is inconsistent with the leading principles of the law of evidence,⁶³ first articulated by Thayer. The first principle he articulated was "that nothing should be received which is not logically probative."⁶⁴ Second, everything which is probative should come in, "unless a clear ground of policy or law excludes it."⁶⁵

If these conventionally accepted principles are indeed the ground of modern evidence law, then important consequences for burden allocation follow. The first principle expresses a policy that the proponent of the evidence should carry the burden of demonstrating relevance. The second principle, however, implies that the exclusion of relevant evidence should be exceptional; whence it follows that the opponent of admission, i.e. the party relying upon the exception to the general principle of admissibility of relevant evidence should have the burden of proving the exception.⁶⁶ Wigmore's placement of the burden of establishing the preliminary facts upon the party offering the evidence conflicts with these basic principles. Allocations which are faithful to those basic principles must be made according to more complex and more flexible criteria.

The scholars who proposed codifications of evidence gave more detailed consideration than Wigmore to the assignment of burdens in the issue of ad-

⁶² 1 J. WIGMORE, *supra* note 1, § 18, at 347.

⁶³ J. THAYER, *supra* note 17, at 530.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See F. JAMES & J. HAZARD, *supra* note 9, § 7.12, at 282-84 (burden on party asserting exception to general rule). See also G. FLETCHER, *RETHINKING CRIMINAL LAW*, § 7.2.1, at 520 (1978).

missibility. The first significant attempt to codify the law of evidence culminated in 1942 with the approval of the Model Code of Evidence by the American Law Institute.⁶⁷ The Code specifically addressed the issue of allocation in Rule 11, which imposed the burden of proof generally on the proponent of the evidence except where there was an implicit decision to allocate it otherwise, as indicated by the use of the term "unless."⁶⁸ Although the Model Code was complex, it showed that codification of the law of evidence could be accomplished.⁶⁹ The Code was valuable in directing attention to the issues of preliminary fact finding, and in creating an explicit mechanism for allocating burdens of production and persuasion. The Code was bottomed upon "a sweeping declaration that all relevant evidence is admissible, that no person is

⁶⁷ MODEL CODE OF EVIDENCE (1942).

⁶⁸ *Id.*, Rule 11, at 87. Rule 11 provides as follows:

Rule 11. Preliminary Hearing By Judge.

When the qualification or disqualification of a person to be a witness, the admissibility or inadmissibility of relevant evidence, or the existence or non-existence of a privilege is stated in these Rules to be subject to a condition and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and

- (a) each party is entitled to present evidence and to examine and cross-examine witnesses as to the fulfillment or non-fulfillment of the condition at a preliminary hearing to be held by the judge in or out of the presence of the jury, as he may in his discretion prescribe;
- (b) subject to Rule 704 (rule governing effect of presumption), *the proponent of the witness or evidence or the claimant of the privilege has both the burden of producing evidence and the burden of persuasion of the fulfillment of the condition, except that the opponent has both burdens when*
 - (i) the statement of the condition upon which such qualification, admissibility, or existence depends begins with the word "unless," or
 - (ii) the statement of the condition upon which such disqualification, inadmissibility or non-existence depends begins otherwise than with the word "unless."

Id. at 87-88 (emphasis added).

⁶⁹ See Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A.J. 23, 25 (1942) (Rule 11 is cited as one of the "[l]engthy rules of complex syntax.>"). A review of sections of the Model Code quickly shows the difficulty of interpreting Rule 11. The advantages contemplated by its drafters were not apparent to commentators. Even with a copy of the Code in hand, the application of Rule 11 would not be an easy task. The comment accompanying Rule 11 illustrates its complexity:

When the statement of a condition of the qualification of a witness or admissibility of evidence or existence of a privilege begins with "if," as in Rule 204 [witness' privilege against self-incrimination] or is phrased in terms not involving the use of "if" or "unless," both burdens are normally upon the party presenting the witness or offering the evidence or claiming the privilege; when the statement begins with "unless," as in Rule 101, [witness competency] both burdens are upon his adversary. On the other hand, when the statement is of a condition of disqualification, inadmissibility or non-existence, as in Rule 227 (2), [state secrets privilege] the proponent has both burdens if the statement begins with "unless"; otherwise the opponent has both burdens.

MODEL CODE OF EVIDENCE, Rule 11, comment (1942). See Gard, *The Uniform Rules of Evidence*, 31 TUL. L. REV. 19, 23-24 (1956) (Model Code unpopular because of [1] broad discretion of trial judge, [2] virtual abolition of rule against hearsay where declarant is unavailable, [3] complexity [citing Rule 11], and [4] rules of privilege). See also R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 1193-94, 1194 n.5 (1977).

incompetent as a witness and that there is no privilege to refuse to be a witness or to disclose relevant matter or to prevent another from disclosing it."⁷⁰ True to its premises, the Model Code usually assigned the burdens of production and persuasion to the opponent of the admission of logically relevant evidence.⁷¹

The Model Code of Evidence was an important step in the modern codification movement, but the ALI was unsuccessful in urging its adoption.⁷² After World War II, the National Commissioners on Uniform State Laws turned their attention to evidence, and, using the Model Code as a basis,⁷³ drafted the Uniform Rules of Evidence.⁷⁴ Like the authors of the Model Code, the drafters of the Uniform Rules began "with the traditional idea that all relevant evidence is admissible unless affirmatively excluded or limited."⁷⁵ The Uniform Rules expressly addressed the allocations issue in Rule 8, governing preliminary fact determinations, placing allocations of the burdens within the discretion of the trial judge.⁷⁶ As Professor Morgan noted, the "rule makes no attempt to allocate the burden of evidence or the burden of persuasion on the preliminary question."⁷⁷ Since the allocation is discretionary, it would not

⁷⁰ MORGAN, *Foreword*, MODEL CODE OF EVIDENCE 11 (1942).

⁷¹ See, e.g., MODEL CODE OF EVIDENCE, Rule 101 (competency of witnesses); Rule 212 (attorney-client privilege exception); Rule 217 (marital privilege exception); Rule 222 (physician-patient privilege exception); Rule 224 (refusal to reveal religious belief unless material); Rule 225 (refusal to reveal vote in a political election unless judge finds it was cast illegally); Rule 227 (refusal to reveal a state secret unless judge finds it is not a matter of state secret or chief officer of governmental department has consented); Rule 229 (communication to grand jury); Rule 230 (identity of informer); Rule 231 (waiver of privilege by contract or previous disclosure). But see, e.g., Rule 204 (privilege against self-incrimination); Rule 210 (attorney-client privilege); Rule 215 (marital privilege); Rule 219 (priest-penitent privilege); Rule 221 (communication between physician and patient); Rule 226 (trade secrets); Rule 228 (official information of government). These rules all allocated the burden to the opponent of logically relevant evidence.

⁷² 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5005, at 86-89 (Code attacked by many, including Wigmore and was nowhere adopted); McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEX. L. REV. 559, 559 (1955) (No state accepted the Model Code as authority, perhaps because it was thought too radical in its reforms and overly academic in style.).

⁷³ UNIF. R. OF EVID., prefatory note, at 161 (1953).

⁷⁴ UNIF. R. OF EVID. (1953).

⁷⁵ *Id.*, prefatory note, at 163.

⁷⁶ *Id.* at Rule 8. Rule 8 provides as follows:

Rule 8. *Preliminary Inquiry by Judge.* When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Id.

⁷⁷ E. MORGAN, BASIC PROBLEMS OF EVIDENCE 51 (1962).

necessarily have been consistent with the "traditional idea" at the basis of the rules.

The drafters of the Uniform Rules were clearly dissatisfied with Model Code Rule 11. In the Comment to their Rule 8, they acknowledge their

somewhat drastic modification of the very complicated Rule 11 of the ALI Model Code. Several new features should be noted:

(a) Simplification in leaving the determination of burdens on preliminary matters to common sense rather than rule of thumb. . . .⁷⁸

The complexity of Model Code Rule 11 belies its characterization as a "rule of thumb."⁷⁹ Moreover, the judge's discretionary allocations of burdens of production and persuasion under Rule 8, guided only by implication from "the rule under which the question arises," may not have infallibly reflected "common sense." Further, not every trial judge would have perceived the implication in the same way, and allocations would not have been predictable to the litigants.

The latest and most influential stage in the evidence codification was the enactment of the Federal Rules of Evidence.⁸⁰ Rule 104 governs the determination of preliminary questions.⁸¹ It describes the preliminary questions which may be disputed: "The qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence."⁸² The rule is silent on the allocation of the burden of persuasion in preliminary disputes,⁸³ leaving the issue to judicial development. The shift of the law of evidence from a common law basis to a statutory one adds a new element to the analysis of burden allocation. In a statutory framework, the first place to look for assignment of burdens is to the language of the governing statute.⁸⁴ As Professor Cleary noted, however, statutes are often drafted without sufficient consideration of their procedural consequences.⁸⁵ Since Professor Cleary was the Reporter, it is ironic that many of the Federal Rules of Evidence appear to have been drafted in this way. Consequently, before a system for allocating burdens of proof on preliminary fact questions can be developed, one must look to the policies embodied in the various rules, as well as considerations of fairness and efficiency.

IV. BASES FOR BURDEN ALLOCATION ON PRELIMINARY QUESTIONS

The leading commentators in evidence have devoted little attention to the reasons for burden allocation in preliminary fact determinations, and the

⁷⁸ UNIF. R. OF EVID., Rule 8, comment (1954).

⁷⁹ *Id.*

⁸⁰ Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1929 *codified at* 28 U.S.C. app. at 539 (1976 & Supp. 1980).

⁸¹ FED. R. EVID. 104.

⁸² *Id.*

⁸³ No draft of the rules addressed the problem. *See* 56 F.R.D. 183, 196-99 (1972) (Supreme Court transmission to Congress); 51 F.R.D. 315, 325-38 (1971) (March 1971 Draft); 46 F.R.D. 161, 186-91 (1969) (March 1969 Draft).

⁸⁴ *See* Cleary, *supra* note 23, at 8.

⁸⁵ *Id.*

leading codifications have either been unclear or silent. Nonetheless, it is important to develop criteria which can guide courts in making these often crucial decisions. When the court assigns the burdens of proof in preliminary fact determinations, it should have a principled basis for its decision. In some cases, the wording of the rule of evidence will imply a burden-allocation.⁸⁶ In others, where the wording is neutral, the considerations identified by Professor Cleary for substantive law questions, policy, fairness and probability, should provide the starting point in the search for guiding principles.⁸⁷ Although vague, when applied to specific cases and given substantive content, they offer considerable guidance in making an allocation decision.

Policy, though difficult to define,⁸⁸ is the most basic principle governing burden allocation. When there is a controlling statute, it is often possible to discern the purposes the statute was intended to serve. From these purposes, it is usually possible to deduce a preference for particular results. An allocation of the burdens of proof should be made so as to comply with this preference. Many of the Federal Rules of Evidence imply a preference for a certain result, whether it be exclusion or admission.⁸⁹ The policy concerns reflected in the purposes and embodied in the preference of a rule can be promoted by placing the burden of proof in any given case on the party asserting the opposite of the preferred result.

Policy considerations alone, however, should not control the allocation of burdens. The approach of Uniform Rule 8 is that policy, "as implied by the rule under which the question arises,"⁹⁰ should be the sole determinant. The problem with making policy the sole determinant is that the policy implications are not always indisputable. When the policy cannot be determined, the judge has no other guide in making the allocation. There are other concerns, directly related to the preliminary fact-finding process, which should also influence the allocation of burdens. These other concerns, adapted from Cleary's model, are fairness and efficiency.

Rule 102 of the Federal Rules indicates that interpretation of the rules should seek "to secure fairness in administration."⁹¹ In the burden of proof context, fairness to the parties focuses more on the process of obtaining evidence than on the governing rule of evidence.⁹² Yet, placing the burdens on the party with greater access to means of proof does not, at least directly, implement the policy of the governing rule. Rather, the allocation is based on the notion that it would be unjust to burden the party who is less able to obtain the

⁸⁶ See, e.g., FED. R. EVID. 403, 412(c)(2), 609(a)(1), 1003(1).

⁸⁷ See *supra* text and notes at notes 41-59.

⁸⁸ Cf. *Wallihan v. Hughes*, 196 Va. 117, 82 S.E.2d 553 (1954) (public policy a "will-o'-the-wisp of the law [that] varies and changes with the interests, habits, need, sentiments and fashions of the day." *Id.* at 125, 82 S.E.2d at 558).

⁸⁹ See *supra* note 86.

⁹⁰ UNIF. R. OF EVID., Rule 8 (1953). See *supra* text and note at note 82.

⁹¹ FED. R. EVID. 102.

⁹² See C. MCCORMICK, *supra* note 4, § 337; 9 J. WIGMORE, *supra* note 1, § 2486 (Chadbourn rev. 1981).

means to overcome it. Because of its generality, this fairness rule may not guide very effectively, except as a nostrum, particularly in the largely unregulated area of preliminary determinations of fact. Fairness, therefore, supplements policy as a criterion to guide the allocation of burdens. The imprecision of the concept, however, limits its usefulness. One must look further for additional guides in developing a comprehensive system for allocating burdens.

Another express goal of the Federal Rules, set out in Rule 102, is the "elimination of unjustifiable expense and delay."⁹³ This rule is concerned with ensuring a satisfactory resolution of the dispute with a minimum cost in time and money.⁹⁴ Probability, as presented by Professor Cleary in the substantive context, is one element of this general principle of efficiency. One way to maximize efficiency is to assume the existence of the probable state of affairs, and to assign the burden of proving the improbable state of affairs to the party that is asserting it. If that party fails to satisfy his or her burden, the decision on admissibility will likely correspond with the probable facts. Court time and effort is not, therefore, wasted by requiring needless proof of likely facts.

Efficiency is broader than probability, however, in that it encompasses several other factors which have been advanced to justify allocation of burdens. First, convenience, broadly defined by McCormick as the natural order of storytelling,⁹⁵ is an element of efficiency. It requires less effort by the factfinder and often less time if the presentation of facts follows a logical progression. Second, burdens imposed to discourage the making of frivolous claims, reflecting the need to conserve judicial resources, constitute an element of efficiency.⁹⁶ Finally, even allocating the burdens to the party with readier access to means of proof reflects concerns of efficiency as well as of fairness, since it would be less cumbersome for that party to present the proof than for his opponent to obtain it and to present it.⁹⁷ The general principle of efficiency thus encompasses Professor Cleary's concept of probability, as well as several other principles which have been advanced as bases for burden allocation.

In preliminary questions especially, efficiency should be an important factor in many allocations: policy implications are not always clear; fairness is vague; and a paramount goal is to return to the primary focus of the trial as quickly and as inexpensively as possible. Despite the importance of efficiency, however, no single one of the three basic concerns should consistently predominate over the others. In some instances, policy may be so clear, or fairness concerns so obvious, that efficiency should neither control, nor influence the allocation. Courts, however, rarely invoke these considerations ex-

⁹³ FED. R. EVID. 102.

⁹⁴ See generally Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

⁹⁵ C. MCCORMICK, *supra* note 4, § 337, at 787.

⁹⁶ See 3 W. LAFAVE, *SEARCH AND SEIZURE*, § 11.2(b), at 506 (1978 & Supp. 1982).

⁹⁷ See *supra* text and notes at notes 48-51, 57.

plicitly in allocating burdens of persuasion and production, but the placement of the burdens necessarily either fosters or hinders the concerns of policy, fairness and efficiency. Consequently, it is incumbent upon courts to consider each of these concerns in allocating burdens. Only then will the policies underlying the rules of evidence as well as fairness and efficiency be properly served.

A review of the few appellate decisions that have addressed the allocation of burdens in preliminary determinations of fact will help to illuminate the hitherto obscure area of rulings on the admissibility of evidence. It will also indicate that the courts are not consistently considering the basic relevant concepts in assigning burdens. Finally, it will demonstrate how an application of the factors of policy, fairness and efficiency to burden-allocation will assist courts to reach better decisions.

V. JUDICIAL TREATMENT OF BURDEN ALLOCATION UNDER THE FEDERAL RULES OF EVIDENCE

This part of the article contains a review of the allocation of burdens on preliminary questions under several provisions of the Federal Rules of Evidence. The Federal Rules are the object of study because of their importance, not only in federal practice, but also on the development of state codifications of evidence.⁹⁸ As has been noted,⁹⁹ the Federal Rules do not contain an express provision addressing the allocation of the burdens. Generally, therefore, the allocation is to be made by the judge with only the legislative guidance found in the individual rules. In this article, the review of certain Federal Rules includes an examination of the development and the wording of the rules, their implications, and their application to the question of burdens. In addition, the rules as interpreted will be evaluated in terms of the criteria for allocating burdens: policy, fairness and efficiency.¹⁰⁰

Federal Rule 104, which deals with preliminary questions of fact, identifies three basic areas in which the trial court must make preliminary determinations of fact: (1) the admissibility of evidence; (2) the qualification of witnesses; and (3) the existence of a privilege.¹⁰¹ The rule's categorization of the issues to be resolved by the trial judge provides a convenient structure for the analysis of the imposition of burdens.

⁹⁸ The Federal Rules of Evidence were the model for the second Uniform Rules of Evidence, proposed in 1974. *See* UNIF. R. EVID., 13 U.L.A. (1980). Either the Federal Rules or the Uniform Rules have been the basis for codifications of evidence law in many states. *See* 1 D. LOUISELL & C. MUELLER, *supra* note 9, at 11 (Supp. 1981).

⁹⁹ *See supra* text and note at note 83.

¹⁰⁰ *See supra* text and notes at notes 88-97.

¹⁰¹ FED. R. EVID. 104(a). Since Congress rejected the drafters' attempt to codify the law relating to privilege, the allocation of burdens on questions relating to privilege claims has not been affected. There are many subtle factors which influence the allocation of burdens in questions of privilege. Although treatment of these questions is not attempted in this article, the basic considerations which have been identified will be the same.

A. Admissibility of Evidence

When Rule 104(a) assigns the responsibility to the trial judge to make preliminary determinations of fact "concerning . . . the admissibility of evidence," it means questions of admissibility other than those listed in the Rule; the qualification of witnesses and privilege.¹⁰² This section will examine specific provisions of the Rules within the broad category of admissibility encompassing issues other than those specifically mentioned in the rule by focusing on the issues which have most frequently involved the allocation of burdens in the dispute over admissibility.

1. Relevance

Relevance is the most basic of the questions concerning the admissibility of evidence.¹⁰³ Federal Rule 402 declares that "[a]ll relevant evidence is admissible," unless otherwise provided, and that "[e]vidence which is not relevant is not admissible."¹⁰⁴ The definition of relevance is provided in Rule 401: evidence must affect the probability of facts of consequence to the determination of the action.¹⁰⁵ Often the probative relationship of the proffered evidence to a material fact will be an obvious, logical one.¹⁰⁶ If the relationship is not apparent to the court, however, it is clearly the proponent's responsibility to establish it.¹⁰⁷

Rule 104 also governs determinations of preliminary issues relating to constitutional exclusionary rules. *See* *United States v. Lee*, 541 F.2d 1145, 1146 (5th Cir. 1976). *See also* FED. R. EVID. 1101(b). Separate lines of authority have developed on the allocation of burdens of production and persuasion in suppression hearings. *See, e.g.,* *United States v. Matlock*, 415 U.S. 164, 171-72, 177-78 (1974) (burden on prosecution to show consent to search); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (burden on prosecution to show fifth amendment warnings have been given). The burdens of production and persuasion generally have been assigned to the movant in a suppression hearing. *United States v. De La Fuente*, 548 F.2d 528, 533 (5th Cir.), *cert. denied*, 431 U.S. 932 (1977). In *De La Fuente*, the court noted that in several classes of cases, once the movant makes a primary showing of illegality, the burden of persuasion to justify admissibility will be placed upon the prosecution. *Id.* at 533-34. *See* 3 W. LAFAVE, SEARCH AND SEIZURE §11.2, at 506-12 (1978).

¹⁰² Also excluded from this assignment of responsibility are those questions which are reserved for the jury by Rule 104(b). FED. R. EVID. 104(a).

¹⁰³ *See* J. THAYER, *supra* note 17, at 264-65.

¹⁰⁴ FED. R. EVID. 402.

¹⁰⁵ FED. R. EVID. 401.

¹⁰⁶ *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5166, at 68 (once an objection is made, the proponent will generally state the purpose for which the evidence is offered to establish relevancy). *See generally* 1 D. LOUISELL & C. MUELLER, *supra* note 9, § 96, at 681 (judge in determining whether evidence is relevant should focus on the purpose for which it is being offered).

¹⁰⁷ *See, e.g.,* *United States v. Ruffin*, 575 F.2d 346, 355 (2d Cir. 1978) (evasion of corporate income taxes; testimony that building had a useful life of only five years not probative of fact the building was valueless during the tax years in question); *United States v. Kelly*, 556 F.2d 257, 265 (5th Cir. 1977) (court did not err in excluding such items as newspaper clippings because the party offering them made no attempt to explain their relevancy to his theory of the case); *Harris v. United States*, 371 F.2d 365, 366-67 (9th Cir. 1967) (while testimony regarding payment of a government informer-witness was relevant, because the ruling against its admission

If the relevance of the evidence is dependent upon other facts, then under Rule 104(b), the judge will admit the evidence if there is sufficient evidence to support a finding of the underlying facts.¹⁰⁸ The ultimate decision on conditional relevance is for the jury,¹⁰⁹ but the proponent must meet the sufficiency standard, and also convince the jury of the connection that supports relevance. Since the proponent bears the burden of showing conditional relevance under Rule 104(b), *a fortiori* it is the proponent's burden to show relevance where it is not dependent upon connecting facts, and the decision is one for the judge under Rule 104(a).¹¹⁰

Although the proponent carries the burden of proving relevance, where there has been some explanation of the relevance of evidence, the trial court has some duty to assist in the development of testimony that would completely establish the relevance. In *Keohane v. New York Central R. Co.*,¹¹¹ the plaintiff had indicated the purpose of evidence he sought to introduce: to establish the defective condition of an elevator before and after an accident.¹¹² When proper follow-up questions were not posed by counsel, the court dismissed the witnesses.¹¹³ In reversing, the Second Circuit held that it "would have been preferable" for the trial judge either to examine the witness himself or to instruct counsel how to do so.¹¹⁴ This unusual case illustrates by exception how the demonstration of relevancy is normally a responsibility of the proponent.

The placement of this responsibility on the proponent is justified by all three basic considerations, although courts do not articulate them. Exclusion of irrelevant evidence is the most basic policy of the law of evidence.¹¹⁵ That the proponent of evidence must show the court that proffered evidence is relevant complies with this basic policy. In addition, the proponent is likely to know how the evidence relates to the issues in dispute so fairness concerns are not violated. That is, the opponent of admissibility is not required to show the absence of probative value, when he may know little or nothing about the disputed evidence. Such a requirement could easily be characterized as unfair. Finally, having the proponent of evidence explain how it relates to the action is certainly the most efficient way to proceed. The proponent's burden will usually be satisfied by an explanation of the logical relationship between the evidence and the facts of consequence to the action.¹¹⁶ The definition of

was discretionary and because the relevancy was not made clear to the trial judge, the ruling was sustained).

¹⁰⁸ FED. R. EVID. 104(b).

¹⁰⁹ *Id.* advisory committee note.

¹¹⁰ 1 D. LOUISELL & C. MUELLER, *supra* note 9, § 96, at 681.

¹¹¹ 418 F.2d 478 (2d Cir. 1969).

¹¹² *Id.* at 479.

¹¹³ *Id.* at 480.

¹¹⁴ *Id.* at 480 n.5.

¹¹⁵ J. THAYER, *supra* note 17, 264-65. See *supra* text and notes at notes 64-66.

¹¹⁶ See *supra* text and notes at notes 106-07.

relevance contained in Rule 401 is a liberal one, favoring admissibility, and the courts and commentators have noted that, in cases of doubt, evidence should be admitted since the jury is capable of according it the proper weight when it is only of slight probative value.¹¹⁷

2. Countervailing Factors Leading to the Exclusion of Relevant Evidence: Rule 403

A countervailing policy is that highly prejudicial evidence, even if relevant, should be barred. The exclusionary rules of evidence are either specific implementations of the rule that relevant evidence is admissible or exceptions to it. Rule 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by dangers of unfair prejudice, of confusion of the issues or of misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.¹¹⁸ This discretionary¹¹⁹ authority to exclude relevant evidence has antecedents in the Model Code of Evidence¹²⁰ and in the Uniform Rules.¹²¹ In the Model Code, an application of the allocation guidelines contained in Rule 11 indicates that the burden was placed upon the opponent to make a showing supporting exclusion. Rule 403 of the Federal Rules has likewise been considered to place the burden of proof on the objector.¹²²

The wording of Rule 403 implies that the burden of justifying exclusion should be upon the opponent of the evidence. When Rule 403 is invoked, the court is dealing with concededly relevant evidence ("Although relevant"), which, as has been discussed,¹²³ is favored evidence. An objection on Rule 403 grounds is a request to the court to exercise its discretion to exclude the evidence.¹²⁴ The judge must evaluate the probative value of the proffered

¹¹⁷ 1 D. LOUISELL & C. MUELLER, *supra* note 9, § 30, at 215 (judge's approach should favor admissibility).

¹¹⁸ FED. R. EVID. 403.

¹¹⁹ In early drafts of the Rules, exclusion of relevant evidence was mandatory if probative value was substantially outweighed by dangers of unfair prejudice, confusion of the issues or misleading the jury. Exclusion was discretionary on the basis of considerations of undue delay, waste of time or cumulation. *See* 51 F.R.D. 315, 345-46 (1971); 46 F.R.D. 161, 225-27 (1969). Even after the elimination of the dichotomy, the retention of the two categories, "dangers" and "considerations" indicates that the former are to be accorded greater weight. Courts often use all the counterweights in analysis. *See, e.g.,* Benna v. Reeder Flying Serv., Inc., 578 F.2d 269, 274 (9th Cir. 1978) (prejudice, confusion of issues and delay).

¹²⁰ MODEL CODE OF EVIDENCE Rule 303 (1942) ("judge may in his discretion exclude evidence if he finds that its probative value is outweighed" by risk of (1) waste of time; (2) undue prejudice, confusion or misleading the jury; (3) unfair surprise).

¹²¹ UNIF. R. OF EVID. 45 (1953) (judge may in his discretion exclude evidence if probative value is substantially outweighed by (1) waste of time; (2) undue prejudice, confusion, misleading the jury; or (3) surprise). Unlike the Model Code and the Uniform Rules, the Federal Rules do not include surprise as a ground justifying exclusion.

¹²² *See* C. MCCORMICK, *supra* note 4, § 185, at 56 n.30 (Supp. 1978).

¹²³ *See supra* text and notes at notes 115-17.

¹²⁴ *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5224, at 318-20.

evidence, and then estimate the countervailing factors listed in the Rule. Arguably the opponent should specify the particular reason for exclusion.¹²⁵ Only if the court finds that the probative value, estimated at its maximum impact¹²⁶ in the context of the trial¹²⁷ is substantially outweighed by one or more of the counterweights, estimated at its likely impact,¹²⁸ may it then exercise its discretion to exclude.¹²⁹ The inclusion of the modifier "substantially" indicates that the balance is rigged in favor of admissibility. In cases of doubt whether the probative value is substantially outweighed, the evidence should be admitted.¹³⁰

Rule 403 is as close to an explicit statement as will be found in the Federal Rules with respect to allocating the burdens of proof on the question of exclusion.¹³¹ Often, rather than involving disputed issues of fact, a Rule 403 decision requires an application of the criteria in the Rule. By weighting the balance in favor of admissibility, the Rule impliedly requires the opponent of evidence, first, to show that the balance disfavors probative value, and second, to justify the court's exercise of discretion.

An example of the measurement of probative value appears in *United States v. Haldeman*.¹³² There, the District of Columbia Circuit explicitly evaluated the probative value of evidence of defendant Ehrlichman's involvement in the Ellsberg-Fielding burglary, admitted at his trial for conspiracy, obstruction of justice, and perjury.¹³³ The court discussed how the evidence "could well have allowed the jury to find a definite link between the two events."¹³⁴ It could be found, for instance, that concealing responsibility for the earlier break-in was part of the motive for concealing involvement in the Watergate break-in.¹³⁵ Evidence of the Ellsberg-Fielding break-in, moreover, might be found relevant to a co-conspirator's threats to reveal information about prior crimes com-

¹²⁵ *Id.* at 319.

¹²⁶ See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 101-02 (3d ed. 1982) (give the evidence its maximum reasonable probative force; citing 1 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 403[03], at 403-18 ["usual approach . . . is to give the evidence its maximum reasonable probative force"]).

¹²⁷ See 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5214, at 273 (judge needs to consider the proffered evidence against the background of all the evidence in the case).

¹²⁸ See S. SALTZBURG & K. REDDEN, *supra* note 126, at 102 ("likely prejudicial impact" of the evidence is the other balancing factor). But see 1 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 403[03], at 403-18 ("usual approach is . . . to give evidence its . . . minimal reasonable prejudicial value").

¹²⁹ See 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5214, at 263-64 (under these circumstances the judge is not required to exclude the evidence, but he "may" do so).

¹³⁰ *Id.* § 5221, at 309 (the purpose of setting the standard at "substantially outweighed" is to further the policy of favoring the admissibility of evidence).

¹³¹ See also FED. R. EVID. 602, 609, 901. The residual hearsay exceptions establish more explicit procedures than any other provisions of the Rules. See FED. R. EVID. 803(24), 804(b)(5).

¹³² 559 F.2d 31 (D.C. Cir. 1976) (en banc) (per curiam), cert. denied 431 U.S. 933 (1977).

¹³³ See *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976) (Ehrlichman was convicted of conspiring to violate civil rights and of perjury. *Id.* at 913).

¹³⁴ 559 F.2d, at 89.

¹³⁵ *Id.*

mitted for the White House, as well as to Ehrlichman's defense that he consistently urged full disclosure.¹³⁶ The court then weighed these findings of relevance against the asserted prejudice, specifically that the presentation of such a large amount of evidence in effect resulted in retrying Ehrlichman on the earlier charges,¹³⁷ that the evidence introduced was the most damning evidence of defendant's guilt on the prior charges,¹³⁸ and that defendant was forced to abandon the presentation of character witnesses because they would be asked questions about the prior convictions.¹³⁹ The court concluded that the challenged evidence was admissible, since "the probative value of the Ellsberg-Fielding break-in far outweighed its prejudicial effect."¹⁴⁰

A rare example of appellate reversal of a trial court decision under Rule 403 is *Ballou v. Henri Studios, Inc.*¹⁴¹ In this wrongful death case, the defendant sought to introduce the results of a blood alcohol test to show that the plaintiffs' decedent was driving while intoxicated and was therefore contributorily negligent.¹⁴² By pretrial motion, the plaintiffs asked the court to exclude evidence of the test, and introduced testimony that no one had detected the presence of alcohol around the body,¹⁴³ as well as testimony that the decedent was not intoxicated ten minutes before the accident.¹⁴⁴ The trial court excluded the evidence " 'because of the lack of credibility of the tests,' " and because it was " 'too harmful' " and " 'extremely prejudicial.' "¹⁴⁵ Reversing, the Fifth Circuit found an abuse of discretion.¹⁴⁶ The assessment of credibility should have been left to the jury.¹⁴⁷ In determining admissibility under Rule 403, the probative value of the proffered evidence is to be gauged as if it were true.¹⁴⁸ In this case, the probative value of the decedent's intoxication on the issue of contributory negligence was deemed to be very high.¹⁴⁹ On the other side of the balance, the appellate court held that, although the evidence would have hurt the plaintiffs' case, it would not hurt it unfairly, and the prejudicial effect was "comparatively slight."¹⁵⁰ Therefore, the court found "as a matter of law that

¹³⁶ *Id.* at 89-90.

¹³⁷ *Id.* at 90.

¹³⁸ *Id.* (noting that the alternative would have been the introduction of evidence which was less probative and more prejudicial).

¹³⁹ *Id.* at 91 n.160.

¹⁴⁰ *Id.* at 91.

¹⁴¹ 656 F.2d 1147 (5th Cir. 1981).

¹⁴² 656 F.2d at 1149.

¹⁴³ *Id.* at 1151.

¹⁴⁴ *Id.* In addition, plaintiffs challenged the authentication of the test, and the trial court agreed. The Fifth Circuit also reversed that ruling. *Id.* at 1151 and n.2, 1154-55.

¹⁴⁵ *Id.* at 1151-52 (quoting the trial court).

¹⁴⁶ *Id.* at 1154. See *United States v. Tibbetts*, 565 F.2d 867, 869 (4th Cir. 1977) (reversal only for "grave abuse" of discretion); *United States v. Johnson*, 558 F.2d 744, 746 (5th Cir. 1977) (reversal only if trial judge "has clearly abused his discretion").

¹⁴⁷ 656 F.2d at 1154.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1155.

¹⁵⁰ *Id.*

the potential for unfair prejudice of the blood alcohol test did not substantially outweigh its probative value."¹⁵¹

The guidelines for allocating burdens on preliminary questions are illustrated by these decisions. First, one policy of Rule 403 is the same as that of Rules 401 and 402: liberality in the admission of evidence.¹⁵² In fact, this policy is even more persuasive in the context of discretionary exclusion, where the relevance determination precedes the question of exclusion. The policy of Rule 403 is that exclusion is justified only in those cases in which the specified dangers and considerations substantially outweigh probative value. This policy mandates that a party seeking to keep probative evidence from the fact-finder should show why the evidence should be excluded. The opponent of the evidence should be able to explain why the balance favors exclusion, and why the court should exercise its discretion to exclude. Nor is this placement of the burden unfair, since the Rule 403 balancing is one which is not usually done on the basis of disputed preliminary facts; it is simply a matter of convincing the judge of the relative merits of the advantages and disadvantages of the proffered evidence. Therefore, in most cases, the opponent of admissibility will not be less able to bear the burden. Finally, this placement of the burden is the most efficient, since the opponent of the evidence can more easily explain precisely how the evidence will result in prejudice to his case or in confusion of the issues, as Ehrlichman attempted to do in *Haldeman*. Nevertheless, the policy consideration is by far the most important in allocating the burdens, since exclusion of relevant evidence is strongly disfavored.

3. Concrete Applications of Balancing Tests

a. *Other acts evidence: Rule 404(b)*

Rule 404(b) is one of the specific applications of the general principles in Rules 401-403.¹⁵³ The first sentence of the Rule provides that "[E]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."¹⁵⁴ It should be noted that the rule excludes such evidence only when offered for the stated purpose.¹⁵⁵ The second sentence of the Rule provides that evidence of other acts "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."¹⁵⁶ Thus where evidence may reflect upon the character

¹⁵¹ *Id.* at 1154.

¹⁵² *See supra* text and notes at notes 104 and 115-17.

¹⁵³ FED. R. EVID. 403 advisory committee note ("The rules which follow in this Article are concrete applications evolved for particular situations."); Rule 402 advisory committee note ("Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy.").

¹⁵⁴ FED. R. EVID. 404(b).

¹⁵⁵ *See* C. MCCORMICK, *supra* note 4, § 188.

¹⁵⁶ FED. R. EVID. 404(b). The list is not exclusive. *See* 2 D. LOUISELL & C. MUELLER,

of the opposing party, it is not admissible unless it is found to be relevant to an independent permissible purpose. Even where such a permissible purpose is found, the evidence is still subject to the limitations upon admissibility imposed by Rule 403.¹⁵⁷

As noted, under Rule 403, the burden is allocated to the opponent of admission. Since Rule 404(b) is a specific application of the principle of Rule 403, one might expect the burden to be placed on the opponent of admissibility to show that the evidence is in fact being misused as character evidence and should be excluded. Considerations of policy, fairness and efficiency, however, counsel differently. In *United States v. Beechum*,¹⁵⁸ the defendant, a postal employee, was convicted of unlawful possession of an old silver dollar which he knew to be stolen from the mails.¹⁵⁹ At the time of his arrest, he was in possession of two credit cards which were not in his name.¹⁶⁰ The government introduced the cards with the obvious purpose of establishing Beechum's intent to possess the silver dollar unlawfully.¹⁶¹ Beechum testified that he had intended to turn in the silver dollar;¹⁶² a defense allegedly undercut by his possession of the credit cards which he had held for nearly a year.¹⁶³ A Fifth Circuit panel reversed the admission of the credit cards,¹⁶⁴ holding that, although the offenses were similar enough, the government had not sufficiently established the prior offense by "plain, clear and convincing evidence."¹⁶⁵

The panel decision was vacated by the court en banc.¹⁶⁶ The en banc court held that "the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses."¹⁶⁷ That he indulged himself depends upon a showing that the defendant committed the prior act, so "the government must offer proof demonstrating that the defendant committed the offense."¹⁶⁸ The

supra note 9, § 140, at 121-45 (Other reasons for which the evidence may be offered are: (1) to show the whole context of the act; (2) to rebut an entrapment defense; (3) to show fear on the part of the victim; (4) to show a *modus operandi*.)

¹⁵⁷ See FED. R. EVID. 404(b) advisory committee note; 2 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 404[19], at 404-117 (proponent of the evidence must convince the trial judge that Rule 403 does not require exclusion of the evidence). See also *United States v. Fosher*, 568 F.2d 207, 212-13 (1st Cir. 1978) (need to consider the possible prejudicial effect of propensity evidence).

¹⁵⁸ 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

¹⁵⁹ 582 F.2d at 903. The defendant was convicted under 18 U.S.C. § 1708 (1976).

¹⁶⁰ 582 F.2d at 904.

¹⁶¹ *Id.* at 909.

¹⁶² *Id.* at 905.

¹⁶³ *Id.* at 909.

¹⁶⁴ *United States v. Beechum*, 555 F.2d 487 (5th Cir. 1977), *vacated en banc*, 582 F.2d 898 (5th Cir. 1978).

¹⁶⁵ *Id.* at 492. See *United States v. Broadway*, 477 F.2d 991 (5th Cir. 1973), *overruled*, *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978).

¹⁶⁶ 582 F.2d at 918.

¹⁶⁷ *Id.* at 911.

¹⁶⁸ *Id.* at 912-13. See also *United States v. Guerrero*, 650 F.2d 728, 733 (5th Cir. 1981) (as a predicate to the admission of an extrinsic act, the government must show that the defendant did it). The court also found that this was a situation of conditional relevance and that the pros-

prosecution must also establish how proof of the other act is evidence for one of the permissible purposes.¹⁶⁹ Finally, the proponent must show the need for the evidence, in light of all the circumstances.¹⁷⁰

The court stated further that once probative value has been established, the risk of prejudice must be analyzed.¹⁷¹ The prejudice of other crimes evidence was recognized as "inherent,"¹⁷² which means that, although the opponent of relevant evidence must demonstrate unfair prejudice in order to justify its exclusion,¹⁷³ where the evidence is of other crimes, wrongs or acts, prejudice is assumed.¹⁷⁴ The battle lines are drawn on the probative value of the evidence: its certainty, its relationship to the defendant, and its relationship to a permissible purpose.¹⁷⁵

Since the key concern is the probative value of a prior act, as it relates to a permissible purpose, the policy consideration clearly militates in favor of placing the burden to show admissibility of prior act evidence upon its proponent. Not only must the proponent show relevance, under Rule 401, but also the proponent must relate the proffered evidence to a purpose other than propensity, a use prohibited by Rule 404(a),¹⁷⁶ as well as Rule 404(b). Since the pro-

ecution, therefore, needed only to make a showing under Rule 104(b), "sufficient to support a finding of the fulfillment of the condition." *Id.* at 913. This portion of the *Beechum* holding has been criticized justly as a bad misconception. See 2 D. LOUISELL & C. MUELLER, *supra* note 9, § 140, at 57 (Supp. 1981); 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5249, at 173 (Supp. 1981). Rule 404(b) is a "concrete application" of Rule 403; the major concern is with unfair prejudice inherent in other crimes evidence. That concern dictates that the decision on admissibility is for the judge alone under Rule 104(a); otherwise the prejudice is realized upon the conditional admission of the evidence.

¹⁶⁹ See 582 F.2d at 911 n.15; 2 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 404[19], at 404-117 (The proponent of the evidence has the burden of proving that the prior act has relevancy to a fact in issue other than propensity.).

¹⁷⁰ See *United States v. Beechum*, 582 F.2d 898, 914-15 (5th Cir. 1978) (Probity must be considered with regard for the availability of other evidence to show one of the permissible purposes, the similarity of the prior act to the charged offense, the distance in time between the acts, and the posture of the case.). See also *United States v. Benton*, 637 F.2d 1052, 1057 (5th Cir. 1981); 2 D. LOUISELL & C. MUELLER, *supra* note 9, § 140, at 116-17.

¹⁷¹ 582 F.2d at 913-14.

¹⁷² *Id.* at 910. See also *United States v. Krezdorn*, 639 F.2d 1327, 1332 (5th Cir. 1981); *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980); G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 46, at 139 (1978) ("great potential for prejudice inherent in other-crimes evidence").

¹⁷³ See *supra* text and notes at notes 118-52.

¹⁷⁴ The prejudicial impact of the evidence can be affected by the way it is presented. See *United States v. Benton*, 637 F.2d 1052, 1057 (5th Cir. 1981). Prejudice is heavily weighted in the 403 balance, so that the need for the evidence is an element in its "incremental" probative value to be weighed against inherent unfair prejudice. *Beechum*, 582 F.2d at 914. Opposing a proffer of other crimes evidence under Rule 404(b) does not require a showing of prejudice; that is a given.

¹⁷⁵ "[T]here is no presumption that other-crime evidence is relevant. . . . '[C]aution and judgment are called for, and a trial judge faced with an other-crime evidence problem should require the Government to explain why the evidence is relevant and necessary.' " *United States v. DeV Vaughn*, 601 F.2d 42, 45 (2d Cir. 1979) (quoting *United States v. O'Connor*, 580 F.2d 38, 43 (2d Cir. 1978)). See also *United States v. Foskey*, 636 F.2d 517, 523-25 (D.C. Cir. 1980).

¹⁷⁶ FED. R. EVID. 404(a) (evidence of a person's character is "not admissible for the

hibition on character evidence is so adamant, the proponent can justly be asked to articulate his theory of the case, and the resulting need for his dangerous evidence. Fairness as well as policy supports this allocation, just as it is fair to ask the proponent of evidence to establish relevance,¹⁷⁷ since he will better be able to explain the precise relationship of the proffered evidence to a permissible purpose. Finally, asking the proponent to explain the permissible use of the evidence is the most efficient approach; else the opponent of the evidence must necessarily speculate upon his adversary's approach to the prosecution of the case.¹⁷⁸ Although under Rule 403 exclusion must be justified by the opponent of the evidence, the reverse is true under Rule 404(b). Unfair prejudice is already posited in the balance; the evaluation of probative value is determinative. The proponent must show that the probative value, as it relates to some permissible purpose, is not substantially outweighed by its inherent unfair prejudice. This allocation is supported by policy, fairness and efficiency.

b. *Impeachment by prior convictions: Rule 609*

Rule 609 of the Federal Rules, which addresses the use of prior convictions to impeach the credibility of witnesses, demonstrates a lucid approach to a complex scheme of policy issues. Its arduous development illustrates the difficulty of the policies that are involved and hence deserves analysis. The allocation decisions emerge directly from the policy implications and exhibit clearly the issues involved in allocating burdens of proof on evidentiary issues.

At common law, a person who had been convicted of a felony or of a misdemeanor involving dishonesty was incompetent to testify.¹⁷⁹ Although this categorical incompetency was eventually rejected, the prior convictions of a witness came to be used to impeach his credibility, more for historical reasons than for reasons of relevance.¹⁸⁰ Indeed, the relevance is difficult to demonstrate: the reasoning generally set forth is that a conviction indicates bad

purpose of proving that he acted in conformity therewith on a particular occasion').

¹⁷⁷ See *supra* text and notes at notes 115-16.

¹⁷⁸ In *United States v. Foskey*, the District of Columbia Circuit noted that trial courts do "not have the luxury of engaging in the type of careful balancing," which is often undertaken in appellate opinions. 636 F.2d 517, 525 (D.C. Cir. 1980). The court suggested:

[I]n future cases the Government should exercise the discretion given it by Fed. R. Crim. P. 12(d)(1) and notify the defense before trial of its intention to introduce any evidence of prior bad acts. If the defense then raises a motion to suppress, the Government should supply the district court with a written analysis of the logical inferences justifying admission of the evidence. Given the complexity of these questions, and the ease of confusion of permissible with impermissible inferences, such a procedure might obviate the need for the district court, as well as the court of appeals, to speculate regarding the Government's theory of the evidence's relevance to the issues listed in Rule 404(b).

Id. at 526 n.8.

¹⁷⁹ See C. MCCORMICK, *supra* note 4, § 43, at 84; see also *infra* text and notes at notes 474-81.

¹⁸⁰ See Ladd, *Credibility Tests — Current Trends*, 89 U. PA. L. REV. 166, 174-80 (1940).

general character and bad general character indicates lack of credibility.¹⁸¹ The prejudicial impact of this evidence, however, is clearer than its relevance. Without regard to credibility, the jury may be influenced by the bad character of the witness to decide the case on grounds other than rational ones.¹⁸² Prejudice is exacerbated when the witness is a party and it is most severe when the witness is a defendant or a defense witness in a criminal case.

Given the doubtful relevance and the obvious prejudice of impeachment by prior convictions, many courts began to abandon the rule of automatic admissibility, and to balance the relevance of the impeachment evidence against its prejudicial effect.¹⁸³ The most important of these decisions was *Luck v. United States*.¹⁸⁴ In *Luck*, the District of Columbia Circuit held that the trial judge had discretion to prohibit impeachment of a criminal defendant by prior convictions.¹⁸⁵ Later decisions amplified the *Luck* reasoning, and provided that the burden was on the defendant to justify exclusion of the impeaching evidence, by showing that its prejudicial effect far outweighed its probative value.¹⁸⁶ Congress abolished the *Luck* doctrine in the District of Columbia in 1970.¹⁸⁷

It was against this background that the drafters of the Federal Rules of Evidence considered the problem of prior conviction impeachment. Rule 609 was one of the most controversial provisions of the Federal Rules,¹⁸⁸ and its drafting history has been accurately described as "labyrinthine."¹⁸⁹ The Advisory Committee's first draft simply followed the common law, permitting impeachment of a witness by evidence of a prior conviction for a felony or a crime involving false statement.¹⁹⁰ The Committee's second, unpublished, draft per-

¹⁸¹ 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 609[02], at 609-54 (person with a criminal past has a bad character and such a person is the sort who would disregard the oath to testify truthfully).

¹⁸² *United States v. Cook*, 608 F.2d 1175, 1192, 1194 (9th Cir. 1979) (Hufstедler, J., dissenting from en banc opinion) (no matter how dishonest a burglar, robber or thief may be, evidence of such past crimes is excluded), *cert. denied*, 444 U.S. 1034 (1980).

¹⁸³ See C. MCCORMICK, *supra* note 4, § 43, at 89-90; 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 609[03], at 609-60 n.1.

¹⁸⁴ 348 F.2d 763 (D.C. Cir. 1965). See 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 609[03], at 609-60 & n.2.

¹⁸⁵ 348 F.2d at 767-68.

¹⁸⁶ See *Gordon v. United States*, 383 F.2d 936, 939 (D.C. Cir. 1967) (Burger, J.) (stating that *Luck* contemplated the defendant bearing the burden of convincing the court to withhold past conviction from the jury), *cert. denied*, 390 U.S. 1029 (1968); *Brown v. United States*, 370 F.2d 242, 244-45 (D.C. Cir. 1966).

¹⁸⁷ D.C. CODE ENCYCL. § 305(b)(1) (West Supp. 1970), District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, § 133(a) (1970).

¹⁸⁸ See 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 314, at 284-303 (subdivision (a) went through no less than six different drafts); 10 J. MOORE, *MOORE'S FEDERAL PRACTICE*, ¶ 609.01[1.-2], at VI-99 (2d ed. 1976).

¹⁸⁹ *United States v. Smith*, 551 F.2d 348, 360 (D.C. Cir. 1976).

¹⁹⁰ 46 F.R.D. 161, 295-96 (1969):

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death

mitted impeachment by a felony conviction "unless the judge finds that the conviction is lacking in probative value on the issue of credibility."¹⁹¹ This formulation explicitly posed the question of relevancy.¹⁹² Its wording implied that the burden of showing the lack of probative value would have fallen upon the opponent of the evidence.¹⁹³ A later draft incorporated language identical to that used in Rule 403: the evidence was to be admissible "unless . . . the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice."¹⁹⁴ Again, the burden of showing inadmissibility would have been imposed upon the opponent.¹⁹⁵ The Rule was submitted by the Supreme Court in the form which the Advisory Committee had initially proposed.¹⁹⁶ As it emerged from Congress, the Rule permits impeachment by felony convictions "if . . . the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."¹⁹⁷ The Rule as enacted also permits impeachment with a conviction for an offense involving dishonesty or false statement, without requiring any balancing of probative value and prejudicial effect.¹⁹⁸ Rule 609(a) addresses the question of impeachment only as it affects criminal defendants;¹⁹⁹ the rule does not address prejudice to prosecution witnesses, or to witnesses in civil cases.²⁰⁰

With regard to evidence of a prior conviction for a felony,²⁰¹ where the crime did not involve dishonesty or false statement, Congress clearly meant to change the allocation of the burden on admissibility and to place it on the proponent, the prosecution, to show that the probative value outweighed the damage to the defendant.²⁰² Thus, the proponent must demonstrate probative

or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment.

Id.

¹⁹¹ See 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 609[01], at 609-47.

¹⁹² *Id.*

¹⁹³ Cf. MODEL CODE OF EVIDENCE RULE 11 (1942) (opponent of the evidence has the burdens of production and persuasion when the condition upon which inadmissibility depends begins with "unless"): *supra* text and notes at notes 67-71.

¹⁹⁴ 51 F.R.D. 315, 391 (1971). See generally 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 609[01], at 609-47-48.

¹⁹⁵ Cf. *supra* text and notes at notes 118-52.

¹⁹⁶ 56 F.R.D. 183, 269-70 (1972); see *supra* note 190.

¹⁹⁷ FED. R. EVID. 609(a)(1).

¹⁹⁸ *Id.* (a)(2).

¹⁹⁹ 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 316, at 324-25 nn. 26-27; see S. SALTZBURG & K. REDDEN, *supra* note 126, at 365-66.

²⁰⁰ *Id.* Rule 403 may limit impeachment in these cases; "it is still an open question." 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 609[06], at 609-89-90; see *United States v. Nevitt*, 563 F.2d 406, 408-09 (9th Cir. 1977), *cert. denied*, 444 U.S. 847 (1979); *United States v. Martin*, 562 F.2d 673, 680-81 n.16 (D.C. Cir. 1977); *United States v. Thorne*, 547 F.2d 56, 58-59 (8th Cir. 1976).

²⁰¹ The language of Rule 609(a) is a "crime punishable by death or imprisonment in excess of one year." FED. R. EVID. 609(a). See 18 U.S.C. § 1 (1976); 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 316, at 322-23.

²⁰² See 120 CONG. REC. H 40,891 (daily ed. Dec. 18, 1974) (remarks of Rep. Hungate);

value. The relationship of the prior conviction to credibility is the most important element in probative value.²⁰³ Convictions sought to be used under Rule 609(a)(1) have probative value on a sliding scale proportionate to the relationship of the underlying offense to credibility.²⁰⁴ For instance, crimes of violence typically do not have high probative value on the issue of credibility, and therefore, for purposes of Rule 609, will not be found highly probative.²⁰⁵ Previous violent behavior has not been thought to relate directly to the propensity for truth-telling. By contrast, where the prior offense "involved dishonesty or false statement," it is as noted automatically admissible under Rule 609(a)(2).²⁰⁶

A second component of probative value is the remoteness of the prior conviction. The older a conviction is, the less it presumably reveals about the witness' character for truthfulness at the present time.²⁰⁷ A fluid, and common-sense interpretation of Rule 609(a)(1) would indicate that the assessment of probative value should take into account the age of the conviction. A nine-year old conviction is much less probative than a two-year old conviction for the same offense. This interpretation is supported by Rule 609(b), which imposes much stricter criteria on the use of convictions which are more than ten years old.²⁰⁸ Yet the concern which Congress expressed over impeachment by remote convictions cannot be met solely by the bright-line test of Rule 609(b); it must also be considered when convictions are less than ten years old as well.²⁰⁹ The witness' conduct since the prior conviction is also a significant factor in probative value.²¹⁰

Finally, if the credibility issue is central, if the case is "a swearing contest,"²¹¹ then the assessment of the probative value of the impeachment evidence assumes greater importance. A witness, even a criminal defendant,

id., at H 40,894 (remarks of Rep. Dennis); *United States v. Smith*, 551 F.2d 348, 359 (D.C. Cir. 1976) (language of Rule 609(a)(1) as enacted manifests an intent to shift the burden of persuasion to the proponent). *But see* *United States v. Vanderbosch*, 610 F.2d 95, 98 (2d Cir. 1979) (the defendant required to show that the prejudicial effect of prior convictions outweighs their probative value).

²⁰³ See *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976) (citing *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968)) (centrality of the credibility issue as a major factor for the judge to consider).

²⁰⁴ See 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 316, at 327-28. See also *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

²⁰⁵ See Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the "Balancing" Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907, 931 (1980) (courts have characterized crimes of physical violence as having little probative value on the issue of credibility).

²⁰⁶ FED. R. EVID. 609(a)(2); see *supra* text and note at note 198.

²⁰⁷ Surratt, *supra* note 205, at 933-35; see 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 316, at 328-29.

²⁰⁸ FED. R. EVID. 609(b). See *infra* text and notes at notes 249-51. The proponent must also provide advance written notice to the adverse party. FED. R. EVID. 609(b).

²⁰⁹ Cf. *United States v. Cathey*, 591 F.2d 268, 275 (5th Cir. 1979).

²¹⁰ Surratt, *supra* note 205, at 934 (the rehabilitation which the passage of time without a conviction indicates is an important factor).

²¹¹ *Id.* at 939-40.

should not be permitted falsely to imply that he has led a blameless life.²¹² Thus, in estimating the probative value of impeaching evidence, the court should take into account the importance of the jury's decision on credibility to the outcome of the case.

Thus, where a conviction is more than ten years old, there is an assumption that its probative value is outweighed by its prejudicial effect. That a conviction is less than ten years old does not, however, support the inverse assumption, that probative value is not outweighed by prejudicial effect. In the case of more recent convictions, the determination must take into account the nature of the offense, the length of time since the conviction, the behavior of the witness since the conviction, and the centrality of the credibility judgment to the outcome of the case.

The element to be balanced against probative value in deciding admissibility is "prejudicial effect to the defendant."²¹³ The similarity of the prior conviction to the offense charged is one possible source of such prejudice.²¹⁴ If the two offenses are the same or similar, it is much more likely that the jury will consider the prior conviction as showing propensity to commit the offense charged. Such an inference is impermissible.²¹⁵ In addition, prejudice may result from the effect of permitting impeachment upon the defendant's decision to testify. If the defendant decides not to testify, the jury may be denied the benefit of a full presentation of his case. Before the defendant makes that decision, he should know the extent to which prior convictions will be admissible to impeach his credibility.²¹⁶ These two examples are elaborations of

²¹² "[T]he rule of evidence should not permit a witness to testify on behalf of a criminal defendant with the appearance of an unblemished citizen, whereas in fact that witness has been convicted of felonies." *Hearings on Federal Rules of Evidence, H.R. 5463 Before the Comm. on the Judiciary*, 93d Cong., 2d Sess. 25 (1974) (statement of Rep. Lawrence J. Hogan). See also 120 CONG. REC. S 37076 (daily ed. November 22, 1974):

Can it really be argued that the fact that a person has committed a serious crime — a felony — has no bearing on whether he would be willing to lie to a jury?

Should a jury be denied that right? Should society be denied the opportunity, in trying to protect itself, in its effort to discover the truth, to show that the witness before it is a man who has committed such a crime and, therefore, might be willing now to lie to a jury? I think not.

Id. (remarks of Senator McClellan). See also C. MCCORMICK, *supra* note 4, § 43, at 89.

²¹³ FED. R. EVID. 609(a)(1).

²¹⁴ *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (a serious problem arises when the prior conviction is for substantially the same crime as that of the present trial), *cert. denied*, 390 U.S. 1029 (1968).

²¹⁵ 383 F.2d at 940.

²¹⁶ *Luck v. United States*, 348 F.2d 763, 768 n.7 (D.C. Cir. 1965), (citing MCCORMICK, EVIDENCE § 43, at 94 (1st ed. 1954)) (defendant who is considering testifying may want to know in advance the extent to which the trial judge will permit impeachment by a prior record). The trial court's decision upon the admissibility of the prior conviction to impeach a witness who is a defendant in a criminal case will very often affect the defendant's decision whether to testify. *United States v. Cook*, 608 F.2d 1175, 1183-84 (9th Cir. 1979) (en banc) (tactical choice to remain silent may be influenced by denial of motion in limine regarding prior convictions). See 3 J.

the basic understanding of prejudice, that is that the jury will conclude " 'if he did it before he probably did so this time,' " ²¹⁷ or that, "because he committed a crime before, we will not feel so bad if we (even erroneously) convict him this time." ²¹⁸ The possibility that the jury will reach either of these conclusions, if it influences the defendant to choose not to testify, is prejudicial for that reason alone. In effect, the court need not believe that the jury will actually draw one of these conclusions in order to find that the prejudicial effect of the impeachment outweighs its probative value. The mere fact that the defendant is dissuaded from testifying since he or she believes the jury will draw those conclusions may render the evidence of prior convictions so prejudicial that it should be excluded.

With respect to the criteria governing the allocation of burdens on the question of admissibility, the policy articulated by Rule 609(a)(1) is clearly the dominant consideration. Unlike Rule 403, which requires the opponent of evidence to demonstrate that its probative value is "substantially outweighed" by one (or more) of several named "dangers" or "considerations," ²¹⁹ Rule 609 strikes a different balance. By adopting this different balance, Congress indicated its concern with the prejudicial effect of evidence of a prior conviction; it also established a different allocation of burdens on the question of admissibility. The allocation established by Congress requires the proponent to

WEINSTEIN & M. BERGER, *supra* note 41, ¶ 609[05], at 609-82 (opening statement of defense counsel and decision as to whether the defendant takes the stand influenced by ruling on Rule 609); 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 315, at 317-18 (chilling effect of ruling on the defendant's decision to take the stand). Therefore, a pretrial determination will be helpful, if not required, in order for the defendant to make an informed decision. *United States v. Oakes*, 565 F.2d 170, 171-72 (1st Cir. 1977) (Generally, it is desirable to rule on the admissibility of prior convictions in advance of the actual testimony.).

The admissibility of impeaching convictions cannot be decided in the abstract; if the defendant seeks an advance ruling, he must at least indicate the substance of his testimony, so that the court can assess the probative value of the proposed impeachment. *Id.* (Balancing problems of the court are minimized if the judge knows about what the defendant is likely to testify.). Some authority indicates that the defendant can establish (1) that he will testify if the proposed impeachment is prohibited and (2) an outline of the nature of his testimony, through representations by his attorney. *United States v. Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc). One of the factors in the *Luck* balance is the importance of the defendant's testimony. *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.) (the more important the defendant's testimony, the more carefully the judge may weigh the relevancy of the prior convictions to credibility), *cert. denied*, 390 U.S. 1029 (1968).

If the testimony is important for the jury's consideration, then the trial court should not permit the looming impeachment to chill the defendant into silence. To that extent, at least, the opponent of the evidence bears some responsibility on the preliminary determination. Without an advance ruling, if the defendant takes the chance of testifying, the trial judge, having heard the testimony, knows its importance.

²¹⁷ *Gordon v. United States*, 383 F.2d at 940.

²¹⁸ See R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 212 (1977) (jurors will not have as great a regret in convicting an innocent man if he has committed crimes in the past).

²¹⁹ See *supra* text and notes at notes 118-30.

prove that the probative value of the proffered evidence outweighs its prejudicial effect.²²⁰ The legislative history indicates that these decisions were not made haphazardly.²²¹

Concerns of fairness and efficiency are markedly less important, but nonetheless they play some role. As is the case with questions arising under Rule 404(b),²²² it is fairer and more efficient to ask the proponent who seeks to impeach with a prior conviction to demonstrate the importance of the impeachment to the presentation of his case. Unlike the purpose of the other acts evidence under Rule 404(b), impeachment is self-demonstrating: the credibility of a witness in the eyes of the jury is certain to be affected by their knowledge of a prior conviction. Casting doubt on credibility, however, is often less central to the resolution of the main issues in the case than is raising questions of intent, motive or identity. Hence the prosecution or plaintiff is not as likely to be harmed by a decision to exclude the testimony. For this reason, as well as the great possibility of prejudice, Congress reversed the formula of Rule 403, and deleted the modifier "substantially."²²³ Therefore, to have prior convictions admitted for impeachment under Rule 609(a), the proponent has the burden of proving that the probative value of impeaching credibility, in the context of the specific case, outweighs the obvious prejudicial effect to the defendant. Specifically, the proponent of evidence establishing a prior conviction must show, if the prior conviction was for a felony that did not involve dishonesty or false statement,²²⁴ that the probative value of the evidence outweighs its prejudicial effect.

Since prior offenses involving dishonesty or false statement have greater probative value on the issue of credibility, Congress decided not to subject those convictions to the balance against prejudicial effect.²²⁵ Whether such convictions are excludable by Rule 403 when their value is substantially outweighed by unfair prejudice is not clear, although most courts have held there is no discretionary authority to prohibit their use.²²⁶

²²⁰ See *supra* text and note at note 202.

²²¹ See *id.*

²²² See *supra* text and notes at notes 176-78.

²²³ See *Hearings before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary, House of Representatives*, 93d Cong., 1st Sess., on Proposed Rules of Evidence, Serial No. 2, 251-52 (1973) (statements of Judge Friendly, Mr. Hungate and Mr. Dennis) (recognizing the possible prejudice and limited value on credibility of prior conviction impeachment); 120 CONG. REC. 2379 (Feb. 6, 1974) (statement of Ms. Holtzman) (prior convictions may be used to show motive or bias of a witness). See also *United States v. Beechum*, 582 F.2d 898, at 922 n.7 (Goldberg, J., dissenting) (majority might try to argue that impeachment evidence of a criminal defendant is less probative of guilt than evidence of an element such as intent).

²²⁴ The difficulty in determining what is a crime involving "dishonesty or false statement" is clear from the floor debates in the House. 120 CONG. REC. 2376-80 (February 6, 1974) (debate as to whether crimes like murder involve dishonesty).

²²⁵ See 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 314, at 302 n.63 (the language in 609(a) "shall be admitted" rather than "may be received" overturns the discretionary approach of *Luck*).

²²⁶ See, e.g., *United States v. Toney*, 615 F.2d 277, 279-80 (5th Cir.) (court has no

Since impeachment by a conviction which is embraced by Rule 609(a)(2) is less restricted, and indeed perhaps an "absolute right,"²²⁷ the proponent bears the burden of showing that the prior conviction involves dishonesty or false statement.²²⁸ That a conviction involves dishonesty or false statement may be clear from the nature of the offense; few would gainsay the relevance of a prior perjury conviction to the question of credibility.²²⁹ The House and Senate conferees mentioned subornation of perjury, false statement, criminal fraud, embezzlement and false pretenses as well.²³⁰ The core of the category is clear: if an offense necessarily involves deception, then it is automatically admissible to impeach.²³¹ Other offenses may be committed in either a deceptive or a non-deceptive manner, for example, petit larceny may "involve" dishonesty²³² or false statement,²³³ or it may not.²³⁴ The courts which have considered the question have determined that the proponent must establish that the conviction fits within the scope of 609(a)(2). For example, a prior conviction for importation of cocaine is an offense "in the uncertain middle category — neither clearly covered nor clearly excluded by the second prong test."²³⁵ In such cases, the proponent must show either that the conviction for an offense was defined in

discretion under FED. R. EVID. 403 to prohibit impeachment of a witness with a prior mail fraud conviction), *cert. denied*, 449 U.S. 985 (1980); *United States v. Wolf*, 561 F.2d 1376, 1381 (10th Cir. 1977) (witness who has prior conviction for making false claims to the government is properly impeachable under FED. R. EVID. 609(a)); *United States v. Hawley*, 554 F.2d 50, 52 (2d Cir. 1977) (distinction between FED. R. EVID. 609(a)(1) and 609(a)(2) is that the judge must admit automatically evidence of prior conviction involving dishonesty or false statement while he has discretion as to felony convictions after weighing probative value against prejudicial effect). *But cf. United States v. Hayes*, 553 F.2d 824, 827 n.4 (2d Cir.) ("It is an open question whether the trial judge retains residual discretion under FED. R. EVID. 403 to exclude a conviction on grounds of confusion, waste of time, or extreme prejudice.") (citing *United States v. Smith*, 551 F.2d 348, 358 n.20 (D.C. Cir. 1976) (language of 609(a)(2) is absolute in nature, but it may be abrogated by the language of Rule 403)), *cert. denied*, 434 U.S. 867 (1977). *See also* 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 609[04], at 609-70.

²²⁷ 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 609[04], at 609-70.

²²⁸ *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977).

²²⁹ Relevance is conventionally accepted, notwithstanding that it is the sheerest propensity evidence, disfavored everywhere else in the law of evidence.

²³⁰ H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9 reprinted in 1974 U.S. CODE CONG. & AD. NEWS, 7051, 7103.

²³¹ *See United States v. Smith*, 551 F.2d 348, 362-63 (D.C. Cir. 1976) ("only those crimes characterized by deceit or deliberate interference with a court's ascertainment of truth").

²³² The ambiguity of the term was foreseen. *See* ADDITIONAL VIEWS OF HON. LAWRENCE J. HOGAN, H.R. REPT. NO. 650, 93d Cong., 1st Sess. 23-26 reprinted in 1974 U.S. CODE CONG. & AD. NEWS, 7051, 7094-96 (problems of defining dishonesty and false statement in jurisdictions where *crimen falsi* are not statutorily defined).

²³³ *See United States v. Papia*, 560 F.2d 827, 845-48 (7th Cir. 1977) (theft conviction alleging fraud and deceit admissible under Rule 609(a)(2) even though no underlying circumstances revealed).

²³⁴ *See United States v. Dorsey*, 591 F.2d 922, 935-36 (D.C. Cir. 1978) (shoplifting conviction for which the underlying circumstances were not shown is not admissible).

²³⁵ *United States v. Hayes*, 553 F.2d, 824, 827 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977).

terms of deception, or that the circumstances of the offense indicated a deceptive propensity, and not mere "stealth."²³⁶

If a prior conviction involves dishonesty or false statement, its probative value on the issue of credibility is clear, assuming there is some validity to the theory of propensity evidence.²³⁷ A witness, having once before engaged in deception, is more likely to do so again than a witness who has never before deceived. Although such assumptions are open to question, particularly in view of the generally dubious nature of propensity evidence, the theory is too well entrenched to be discarded.²³⁸ Thus the policy basis for allocating burdens on admissibility under Rule 609(a)(2) is clear. The proponent must relate the prior conviction to dishonesty or false statement; having done so, there may indeed be no other barrier to its use. The policy being so clear, fairness and efficiency concerns are irrelevant to the placement of the burden.

In *United States v. Crawford*,²³⁹ the District of Columbia Circuit reviewed a ruling of the trial court on the admissibility of a prior conviction which might have been admissible either under (a)(1) or (a)(2).²⁴⁰ The court held, in disapproving the proceedings below after a prior remand, that while a formal hearing is not always required,²⁴¹ "some inquiry into the nature and circumstances of a prior conviction is a prerequisite to its admissibility."²⁴² The burden of proof is "clearly on the prosecution rather than the defendant,"²⁴³ but the court continued in a cryptic footnote, "the critical objective is to get appropriate information about the prior conviction before the trial judge. We establish no rules about how that should be done."²⁴⁴ The court may have been implying that some burden of production rests upon the defendant to come forward with information about the prior offense.

Although it is not clear, the basis for such a burden would appear to be that the person convicted would have better access to information about the offense. Even if that were true, it is difficult to qualify such an allocation of the burden. The prosecution, normally the proponent in these disputes, certainly has access to the information underlying the conviction. For example, in *United States v. Pappia*,²⁴⁵ the government, seeking to impeach with a conviction for

²³⁶ *Id.*

²³⁷ FED. R. EVID. 404(a) advisory committee note.

²³⁸ See R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 272-77 (1977).

²³⁹ 613 F.2d 1045 (D.C. Cir. 1979).

²⁴⁰ *Id.* at 1049.

²⁴¹ *Id.* at 1050. See *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.) (while a hearing on the record is not required, it is strongly recommended since such a hearing allows an appellate court to determine whether the judge has followed Rule 609 in reaching his decision), *cert. denied*, 429 U.S. 1025 (1976).

²⁴² 613 F.2d at 1053.

²⁴³ *Id.*

²⁴⁴ *Id.* at 1053 n.16. See also J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 609[05], at 609-85 n.11.

²⁴⁵ 560 F.2d 827 (7th Cir. 1977).

misdeemeanor theft, asserted that the conviction resulted from a plea agreement on an original charge of forgery.²⁴⁶ The trial court was affirmed in its reliance upon that unchallenged representation in deciding to permit the impeachment under Rule 609(a)(2).²⁴⁷ The burden upon the proponent was not exceedingly onerous, since there was no requirement to prove the underlying forgery charge.²⁴⁸ Clearly, when the prosecution seeks to impeach a witness with a conviction under 609(a)(2), there can be no justification for placing the burden on the defendant, certainly not on the basis that, as the person convicted, he or she will be better able to come forward with the evidence.

The remaining subsections of Rule 609 also raise questions about the allocation of the burden of showing admissibility. Rule 609(b) specifically addresses the problem of convictions which are more than ten years old.²⁴⁹ The difference in language from paragraph (a) is significant. The "general rule" in 609(a) is that evidence of a prior conviction "shall be admitted . . . only if" the requirements of subdivisions (1) or (2) are met.²⁵⁰ Rule 609(b) is couched in terms of exclusion: evidence of a conviction more than ten years old "is not admissible . . . unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."²⁵¹ As submitted by the Supreme Court, the proposed rule banned absolutely the use of convictions more than ten years old, provided there had been no more recent convictions.²⁵² The House of Representatives completely prohibited the use of the older convictions, regardless of more recent convictions, since "the probative value of the conviction with respect to that person's credibility diminished to a point where it should be no longer admissible."²⁵³ The final formulation, which grants the court discretion to permit the use of older convictions, was drafted in the Senate Committee on the Judiciary, which reported, "[i]t is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances."²⁵⁴

The balancing test in Rule 609(b) has been called the "mirror image of the test under Rule 403."²⁵⁵ That characterization, however, is not quite cor-

²⁴⁶ *Id.* at 847.

²⁴⁷ *Id.* at 847-48.

²⁴⁸ *Id.*

²⁴⁹ FED. R. EVID. 609(b); *see supra*, text and note at note 208.

²⁵⁰ FED. R. EVID. 609(a); *see supra* text and notes at notes 202-06.

²⁵¹ FED. R. EVID. 609(b).

²⁵² 56 F.R.D. 183, 269-70 (1972) ("Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.") *See also* D.C. CODE ENCYCL. § 14-305(b)(2)(B) (1970).

²⁵³ *House Comm. on the Judiciary, Report on the Proposed Federal Rules of Evidence*, H.R. DOC. NO. 650, 93d Cong., 1st Sess., 12 reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7085.

²⁵⁴ *S. Comm. on the Judiciary, Report on the Proposed Federal Rules of Evidence*, S.R. DOC. NO. 1277, 93d Cong., 2d Sess., 15, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7062.

²⁵⁵ *United States v. Cathey*, 591 F.2d 268, 277 n.18 (5th Cir. 1979).

rect; the language of Rule 609(b) is more demanding. Not only must the probative value "substantially outweigh" prejudicial effect, but it also must be supported by "specific facts and circumstances."²⁵⁶ Clearly, the rule requires that convictions more than ten years old must meet a high standard if they are to be admissible to impeach a witness. The question remains whether the burden of meeting this high standard necessarily falls on the proponent of the evidence.

The probative value of a remote conviction is much lower than that of a more recent conviction. The elements of prejudice, however, are not necessarily diminished by the remoteness of the conviction. As the court stated in *Mills v. Estelle*,²⁵⁷

Obviously, prior crime evidence is prejudicial. First, a jury is bound to be less reluctant to convict a person whom they know to have been convicted of other crimes by other juries. Second, if used to impeach a defense witness, prior crime evidence risks establishment of guilt by association. Third, if used against a prosecution witness, prior crime evidence invites a jury improperly to weight testimony according to their perceptions of the relative infamy associated with a particular crime.²⁵⁸

The *Mills* court went on to say that the "implicit judgment" of Rule 609(b) was that older convictions were generally more prejudicial than helpful on the issue of credibility.²⁵⁹ Furthermore, the court noted that the time limit "could be conceptualized as a policy statement that if an offender keeps his record unblemished for ten years, he will be presumed to be as truthful as a normal citizen."²⁶⁰ The court added that the judgment on credibility is normative ("a jury *should* not be influenced"), rather than descriptive.²⁶¹ Later cases have affirmed the *Mills* court's language, saying that "609(b) established a presumption against the use of more than 10-year-old convictions."²⁶² Since a presump-

²⁵⁶ FED. R. EVID. 609(b). See *United States v. Cavender*, 578 F.2d 528, 531 (4th Cir. 1978) ("since the power is to be exercised only in the 'rare' and 'exceptional' case, the District Court is required under the Rule to support its finding with 'specific facts and circumstances.' " (footnote omitted)). See also *United States v. Mahler*, 579 F.2d 730, 734-36 (2d Cir. 1978) (requiring finding on the record).

The court must also make its determination "in the interests of justice." One would hope that the language is mere packaging, and that courts are not free to make determinations ignoring or violating those interests even if not specifically required by a rule. The *Cathey* court used the "interests of justice" language to bolster its restrictive reading of Rule 609(b). 591 F.2d at 275.

²⁵⁷ 552 F.2d 119 (5th Cir.), cert. denied, 434 U.S. 871 (1977).

²⁵⁸ 552 F.2d at 120.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* (emphasis in original).

²⁶² *United States v. Cathey*, 591 F.2d 268, 275 (5th Cir. 1979) (citing *Mills v. Estelle*, supported the presumption against the use of more than 10-year-old convictions). See also *United States v. Sims*, 588 F.2d 1145, 1150 (6th Cir. 1978) (Rule 609(b) creates a rebuttable presumption that convictions over 10 years old are more prejudicial than probative); *United States v. Cavender*, 578 F.2d 528, 530 (4th Cir. 1978) (strict limits as to when a conviction more than 10 years old may be used).

tion is a device for allocating the burden of proof,²⁶³ it is clear that the burden is upon the proponent to justify admission under Rule 609(b).

Once again, the policy determinant is the most important basis for the allocation of the burden to the proponent. The prejudicial impact upon the opponent of impeachment is essentially the same as that of less remote convictions. The probative value of older convictions, however, is very suspect. The proponent of a remote conviction must therefore satisfy an exacting standard. Fairness concerns also point in the same direction, since a witness, and the party offering him,²⁶⁴ will not expect impeachment with remote convictions, and they will thus be less prepared to challenge its admissibility.

Rule 609(c) prevents some otherwise admissible convictions from being introduced to impeach a witness.²⁶⁵ Its provisions create an additional question of burden allocation. If a prior conviction, otherwise admissible under Rule 609, has been vitiated by a subsequent finding of rehabilitation, or a finding of innocence, then under subsection (c), it is not admissible to impeach.²⁶⁶ The burden to establish later findings which preclude impeachment is upon the opponent of the evidence. The defendant in *United States v. Wiggins*²⁶⁷ opposed impeachment by a conviction for distribution of heroin, because, he asserted, his release from a halfway house was equivalent to a finding of rehabilitation.²⁶⁸ The Fifth Circuit affirmed the admission of the impeachment evidence because the "release was not shown to be 'based on a finding of . . . rehabilitation,'" ²⁶⁹ nor were the details of the program or the qualifications for release demonstrated.²⁷⁰ Clearly then, both the trial and appellate courts looked to the opponent to establish the condition precedent to inadmissibility of the evidence.

In *United States v. Trejo-Zambrano*,²⁷¹ Trejo had previously been convicted of a marijuana offense.²⁷² His conviction had been vacated under the Federal Youth Corrections Act,²⁷³ a procedure which would make it inadmissible under Rule 609(c).²⁷⁴ The prosecutor's copy of Trejo's record did not reflect the vaca-

²⁶³ Cleary, *supra* note 23, at 16-20 (presumptions as shifting the burdens of production and persuasion).

²⁶⁴ Usually impeachment of a witness is done by the cross-examining party; thus the party offering the witness will oppose impeachment. Under the Federal Rules, however, a party may impeach his own witness. FED. R. EVID. 607. In that case, the opposing party may be resisting impeachment.

²⁶⁵ FED. R. EVID. 609(c).

²⁶⁶ *Id.*

²⁶⁷ 566 F.2d 944 (5th Cir. 1978).

²⁶⁸ *Id.* at 946. The appellant also sought a reversal on the basis of claimed error in balancing probative value and prejudice under Rule 609(a). *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ 582 F.2d 460 (9th Cir. 1978).

²⁷² *Id.* at 464. The trial prosecutor was not certain whether the offense was possession or smuggling. *Id.*

²⁷³ 18 U.S.C. § 5021 (1967).

²⁷⁴ 582 F.2d at 464.

tion, and defense counsel had overlooked it when examining the docket in the Clerk's Office.²⁷⁵ The Ninth Circuit rejected Trejo's argument that Rule 609 required the prosecution to determine whether a prior conviction had been vacated.²⁷⁶ The court held that the government had complied with the discovery provisions of the Federal Rules of Criminal Procedure,²⁷⁷ and that defense counsel's misreading of the docket sheet did not impose any other duty upon the prosecution.²⁷⁸

Judge Kennedy dissented, opining that "it was error to admit evidence of a Federal Youth Corrections Act conviction where the Government has not shown that the conviction had not been expunged."²⁷⁹ Judge Kennedy's approach is the more defensible one in view of the fairness considerations that govern in part the allocation of burdens on preliminary matters. The prosecution knew that FYCA convictions were subject to a certificate of discharge, and simply had not verified the incomplete FBI "rap sheet."²⁸⁰ Defense counsel had raised the question, and indicated unfamiliarity with the subsequent history of the prior conviction.²⁸¹ Particularly when the conviction is a federal one, a federal prosecutor has greater access to subsequent records than does a defense counsel.²⁸² Concerns of fairness, since they dictate that the party with better access to the record should generally bear the burden, support the dissent's analysis. The efficiency concern is a closer question. If the conviction otherwise complies with Rule 609, a question disputed in *Trejo-Zambrano*,²⁸³ then perhaps the opponent who seeks to rely upon a later event to render the conviction unusable should bear the responsibility of establishing the later event. Given the practicality of access to the information, this argument is outweighed by concerns of fairness.

Rule 609(d) provides that an adjudication of juvenile delinquency is "generally not admissible" to impeach a witness. If the court "is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence," however, it may permit such impeachment of any witness other than a criminal defendant.²⁸⁴ It is clear that the general rule is one of exclusion, and the burden is upon the proponent to show the necessity for the impeach-

²⁷⁵ *Id.* at 465.

²⁷⁶ *Id.*

²⁷⁷ FED. R. CRIM. P. 16(a)(1)(B).

²⁷⁸ 582 F.2d at 465.

²⁷⁹ *Id.* at 466 (Kennedy, J., dissenting).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See FED. R. CRIM. P. 16(a)(1)(B) advisory committee note ("A defendant may be uncertain of the precise nature of his prior record and it seems therefore in the interest of efficiency and fair administration to make it possible to resolve prior to trial any disputes as to the correctness of the relevant criminal record of the defendant.").

²⁸³ See 582 F.2d at 465-66.

²⁸⁴ FED. R. EVID. 609(d).

ment.²⁸⁵ In *United States v. Decker*,²⁸⁶ the Fifth Circuit affirmed the exclusion of impeachment by a juvenile adjudication, since "[a]ppellants proffered no evidence concerning the adjudication."²⁸⁷ The policy protecting juveniles from collateral consequences of delinquency adjudications is a powerful one, and should yield only in the most compelling circumstances.²⁸⁸ Once again, fairness and efficiency are secondary concerns.

In summary, Rule 609, despite its tortuous development, is a valuable example of explicit policy choices, and their procedural consequences. Congress in adopting the rule limited impeachment, articulated standards for its use, and allocated burdens on admissibility to achieve its goals. A conviction relating to deception is considered very probative, and, once its nature is shown, it is virtually impossible to exclude. Other convictions vary in their probative value and prejudicial effect so, when the impeachment is of a criminal defendant or defense witness, the proponent must justify their use. Prosecution witnesses and witnesses in civil cases are less protected. There, the opponent of impeachment must justify exclusion under Rule 403. Older convictions and juvenile adjudications are only rarely to be used, thus, the proponent must meet more exacting tests. If the probative value of a usable conviction is undercut by later rehabilitation, or finding of innocence, it is normally the opponent's burden to prove the later event. In sum, the allocations of the burden have generally advanced the policies articulated in the various provisions of Rule 609.

4. Hearsay and its Exceptions

a. Rule 801(a)

Unlike Rules 403, 404(b) and 609, the Rules governing the definition of hearsay and its exceptions do not involve a balance of probative value and prejudice. The application of the hearsay rules is one which requires an analysis of the elements of a definition and a determination whether proffered evidence meets the terms of the definition. The general policy of the Federal Rules is that relevant evidence is admissible, unless excluded by another rule.²⁸⁹ The hearsay exclusion articulated in Rule 802 is the prime example of a rule of inadmissibility. "Hearsay is, of course, a prolific breeder of questions as to admissibility."²⁹⁰ The drafters of the Federal Rules tackled the thankless task of

²⁸⁵ *Id.* The offense which is the basis of the adjudication must also be one which would be admissible were it a criminal conviction. *Id.*

²⁸⁶ 543 F.2d 1102 (5th Cir. 1976), *cert. denied*, 431 U.S. 906 (1977).

²⁸⁷ *Id.* at 1104.

²⁸⁸ See *Davis v. Alaska*, 415 U.S. 308, 315-20 (1974) (confrontation clause requires the permitting of bias impeachment, if critical to issue of credibility).

²⁸⁹ FED. R. EVID. 402; see *supra* text and notes at notes 104 and 115.

²⁹⁰ 10 J. MOORE, MOORE'S FEDERAL PRACTICE, § 104.13 [5], at I-54 n.4 (2d ed. 1982).

codifying the rule against hearsay evidence and its exceptions.²⁹¹ The very first sentence of their formulation, defining "statement," raises many questions about the allocation of burdens on preliminary questions. "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."²⁹² The Advisory Committee's accompanying note highlights one problem, the determination whether an assertion is intended.²⁹³ The Committee indicated that by their wording, they intended to impose the burden of proving that an assertion was intended upon the party claiming that an assertion was made.²⁹⁴ So, when evidence of conduct is offered, there must be a preliminary finding on the issue whether it was intended as an assertion. The proponent must "indicate the conduct he intends to prove and the inference he intends to draw."²⁹⁵ Then, if the opponent makes a hearsay objection that the conduct was assertive and that it is offered to prove the truth of the matter,²⁹⁶ the judge must rule on the objection. He must decide whether the proffered conduct was intended as an assertion of the matter sought to be proven. The burden of showing such an assertion was intended is upon the objector.

A classic situation in which these issues arise is that of a defendant offering evidence that someone else fled the scene of a crime. If the third party was intentionally seeking to draw suspicion to himself, the proffered evidence is inadmissible hearsay. According to Professor Maguire, "[t]he prosecutor should have the burden of establishing that claim."²⁹⁷ Judge Weinstein agrees, saying that "casting the burden of proving an assertion on the objector seeks to make relevant evidence . . . more readily available to the trier of fact."²⁹⁸

The reasoning which supports this assignment of the burden of persuasion reflects the policy of a permissive attitude toward admissibility of relevant evidence,²⁹⁹ as well as a judgment that non-assertive conduct should not be ex-

²⁹¹ See *Proposed Federal Rules of Evidence: Hearings before the Special Subcommittee on Reform of Federal Criminal Laws, House of Representatives*, 93d Cong., 1st Sess. Ser. No. 2, 252 (1973) ("It [hearsay] seems to be about the last subject in the world I would try to codify.") (statement of Judge Friendly).

²⁹² FED. R. EVID. 801(a).

²⁹³ FED. R. EVID. 801 advisory committee note.

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility.

Id.

²⁹⁴ *Id.*

²⁹⁵ 4 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 801(a)[02], at 801-62.

²⁹⁶ See FED. R. EVID. 801(c).

²⁹⁷ Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 766 (1961). The basis for Professor Maguire's conclusion is that jurors, with the aid of opposing counsel, will be able to assess that claim, and the evidence should not be kept from them, unless of course, the judge has decided that it is assertive conduct. *Id.* at 767.

²⁹⁸ 4 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 801(a)[02], at 801-63.

²⁹⁹ *Id.* at 801-60 (close cases should be decided in favor of admissibility).

cluded as hearsay, because it does not present the problems of out-of-court assertions.³⁰⁰ Professor Maguire concurred with the former view: "relevant evidence is acceptable unless barred . . . [;] the proper normal course must be to put on objecting parties the burden of establishing, in debatable cases, the intention [to assert]"³⁰¹ He conceded that this approach has not been embraced by the courts,³⁰² but he argued that assessing reliability in these cases is well within the ability of the jury.³⁰³ Therefore, he concluded, except where the case is clearly made against it, the evidence and the decision ought to be given to them.³⁰⁴

Once again, the policy consideration is predominant in the allocation of burdens. The implications of fairness and efficiency are difficult to work out in the abstract, since neither party may have access to information about the motivation of the person whose conduct is in question. If the logical order of presentation is important, it would seem that the reason for the person's conduct is an integral part of the process of proof, and therefore the burden should be the proponent's. The policy reasoning, increasingly liberal admission of evidence which might be hearsay, however, places the responsibility to show that an assertion was in fact intended, upon the opponent.

b. *Exceptions — Admissible Hearsay*

Less esoteric questions arise much more frequently over the applicability of a hearsay exception. The traditional position is that the proponent of hearsay evidence bears the burden of satisfying the judge that the proffered evidence fits within an exception to the hearsay rule.³⁰⁵ The codification of exceptions to the ban on hearsay and of the exceptions to the exceptions, however, has revealed that the allocation of burdens is not as simple as it once seemed. Clearly the proponent of hearsay evidence must establish each of the elements of the argued-for exception. Even if the proffered evidence meets the basic requirements of an exception, the opponent of the evidence might assert that the evidence falls within an exception to the exception.³⁰⁶ The burden is upon the

³⁰⁰ But see 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 414, at 85-87 (non-assertive conduct gives rise to four risks which are related to hearsay: (1) misperception; (2) flawed memory; (3) ambiguity; and (4) since the determination as to whether conduct is assertive is difficult, if the court errs by admitting assertive conduct, the jury may be misled).

³⁰¹ Maguire, *supra* note 297, at 766.

³⁰² *Id.* Cf. *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 505 F. Supp. 1190, 1242 (E.D. Pa. 1980) ("[P]roponents of diary entries bear the burden of establishing that they are assertions In the absence of such a foundation, the entries cannot qualify as admissions under 801(d)(2).").

³⁰³ Maguire, *supra* note 297, at 762.

³⁰⁴ *Id.* (Since no specialized intelligence is required to determine whether conduct is non-assertive, such a determination should be left to the jury.).

³⁰⁵ 1 D. LOUISELL & C. MUELLER, *supra* note 9, § 35, at 258. See also CAL. EVID. CODE § 405 comment (West 1966).

³⁰⁶ See, e.g., FED. R. EVID. 803(3) (statements of memory or belief used to prove the fact remembered or believed are not admissible unless they relate to declarant's will); FED. R. EVID.

opponent to establish that, notwithstanding the satisfaction of the basic requirements, the evidence is inadmissible. The approach is the familiar confession and avoidance of the common law.³⁰⁷

(i) Admissions

When a party offers an out-of-court statement which is in some way attributable to his opponent — an admission — it will not be excluded by the hearsay prohibition.³⁰⁸ At common law, admissions are considered an exception to the hearsay rule, but the Federal Rules of Evidence treat admissions as excluded from the definition of hearsay since their admissibility is not dependent upon circumstantial guarantees of trustworthiness.³⁰⁹ Rule 801(d)(2) lists five kinds of statements which are classified as admissions.³¹⁰ Whether admissions are hearsay exceptions or exclusions, the burden of showing admissibility is upon the proponent of the statement.³¹¹

The category of admissions which has been subject to the most judicial and academic attention is that of statements by a co-conspirator of a party.³¹² The elements which must be established for such a statement to be admitted were listed by the Eighth Circuit in *United States v. Bell*:³¹³ "[i]t is well-

803(6)-(8) (records inadmissible if source of information, or the method or circumstances of preparation indicate lack of trustworthiness); FED. R. EVID. 804(a) (declarant is not unavailable if the proponent of the evidence wrongly induced or procured his absence); FED. R. EVID. 804(b)(3) (statements against interest offered to exculpate accused inadmissible unless corroboration indicates their trustworthiness).

³⁰⁷ Cleary, *supra* note 23, at 8 & n.8. See also G. FLETCHER, *RETHINKING CRIMINAL LAW* 521 (1978); J. LANDERS & J. MARTIN, *CIVIL PROCEDURE* 326 (1981)

[A] defendant who did not traverse the declaration might admit the facts to be true and allege new facts which avoided the legal effect of the original facts. This was called a *plea by way of confession and avoidance*. Note that two elements were necessary for a proper plea by way of confession and avoidance — defendant had to admit or confess the declaration and then allege additional matters which avoided the apparent right of plaintiff.

Id. (emphasis in original); J. MCKELVEY, *PRINCIPLES OF COMMON-LAW PLEADING* 102-24 (1917).

³⁰⁸ See C. MCCORMICK, *supra* note 4, § 262.

³⁰⁹ See FED. R. EVID. 801(d)(2) advisory committee note.

³¹⁰ The basic categories of admissions are (1) personal, (2) adoptive, (3) authorized, (4) agency, and (5) co-conspirator. See FED. R. EVID. 801(d)(2).

³¹¹ The affectation of the drafters in categorizing admissions as non-hearsay rather than as an exception to the exclusionary rule does not affect the burden of allocation or the identity of the decisionmaker. Cf. 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 427, at 368.

[T]o say that such a [co-conspirator's] statement is not hearsay, and therefore not subject to the technical evidentiary concerns which underlie the hearsay doctrine, simply will not do. Of course Rule 801(d)(2) instructs us that such statements are 'not hearsay,' but this magical transmutation does not alter the fact that such statements, when offered for their truth, do fit the hearsay definition set forth in Rule 801(c), and emphatically do give rise to all of the concerns which have traditionally underlain the hearsay doctrine."

Id.

³¹² See J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 801(d)(2)(E)[01].

³¹³ 573 F.2d 1040 (8th Cir. 1978).

established that an out-of-court declaration of a co-conspirator is admissible against a defendant if the government [proponent] demonstrates (1) that a conspiracy existed; (2) that the defendant and the declarant were members of the conspiracy; and (3) that the declaration was made during the course of and in furtherance of the conspiracy.³¹⁴ The policy of hearsay exclusion is predominant, and an exception to that policy must be justified by the party relying upon it.³¹⁵

As is the case with many other preliminary questions of fact, one of the most disputed procedural issues when a party attempts to introduce an admission is whether the decision on preliminary facts must be made by the judge or by the jury.³¹⁶ The trend among the circuits with respect to co-conspirator declarations has been that the decision is one for the trial judge under Rule 104(a).³¹⁷ The possibility of jury misuse of co-conspirator statements is so great that the trend is clearly correct.³¹⁸ Those who assert that the preliminary question is one for the jury view the question as one of conditional relevancy rather than purely of admissibility.³¹⁹ So viewed, the case is even stronger for placing the burden of justifying admission upon the proponent. To do so is consistent with the practice under Rules 401 and 104(b), relating to relevancy.³²⁰

Certainly if a statement were proffered on the basis that it was a statement by a person authorized by an adverse party³²¹ or a statement by the agent of a party,³²² the existence of facts which would warrant attribution is a decision that, under Rule 104(a), must be made by the judge.³²³ There is simply too great a danger that the jury will ignore the preliminary requirements of finding authorization or agency and proceed to consider the statement as substantive

³¹⁴ *Id.* at 1043.

³¹⁵ See *supra* text and note at note 305.

³¹⁶ See note 9, *supra*; 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 424, at 293-95.

³¹⁷ See, e.g., *United States v. James*, 590 F.2d 575, 579-80 (5th Cir. 1979); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States v. Petrozziello*, 548 F.2d 20, 22-23 (1st Cir. 1977). See also 1 D. LOUISELL & C. MUELLER, *supra* note 9, § 29, n.4.1 (Supp. 1980) (post-Rule cases in which the responsibility for preliminary matters rests exclusively with the judge). But see Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting the Conspiracy Back into the Coconspirator Rule*, 5 HOFSTRA L. REV. 77, 94-95 (1976) (Since the independent-proof-of-preliminary facts requirement of the co-conspirator rule provides strict guidelines for the trier of fact, it is inappropriate for the judge to make a preliminary determination.); C. MCCORMICK, *supra* note 4, § 53, at 123-24 & 124 n.97.

³¹⁸ See 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 427, at 370-71 n.7 (The mental acrobatics required to separate the preliminary question of admissibility from the ultimate question of guilt and the fact that the statement itself asserts the fact upon which its admissibility is based makes the judge the proper party to determine whether the alleged co-conspirator's out of court statement is admissible.).

³¹⁹ See 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 427, at 367-68.

³²⁰ See *supra* text and notes at notes 108-10.

³²¹ FED. R. EVID. 801(d)(2)(C).

³²² FED. R. EVID. 801(d)(2)(D).

³²³ See 1 D. LOUISELL & C. MUELLER, *supra* note 9, § 29, at 207-08 (The best approach is for the judge to make an independent finding as to the existence of the preliminary fact that the party-opponent authorized the statement or that it was made by its agent.).

evidence. The danger of such misuse is even greater in the case of co-conspirator declarations.³²⁴ This danger, however, is not so great if the dispute concerns the identity of the declarant or the adoption of a statement by a party. If the party did not make or adopt the statement, it will in many cases be irrelevant, and the jury can often be trusted to ignore irrelevancies.³²⁵ Thus, in most of the categories of admissions listed in Rule 801(d)(2), the decision as to preliminary facts should clearly be made by the judge. Where a statement is purportedly an admission because adopted by a party, however, it may well be the decision as to preliminary facts (i.e., was it in fact adopted?) should be left to the jury.

With respect to the admissibility of adoptive admissions, codified in Rule 801(d)(2)(B), Dean Wigmore wrote:

It would seem to be better to rule at least that any statement made in the party's presence and hearing is receivable, *unless* he can show that he lacked either the opportunity or the motive to deny its correctness; thus placing upon the opponent of the evidence the burden of showing to the judge its impropriety. But the burden is in practice generally left upon the proponent to show that the requisite conditions existed; though the middle course is sometimes taken of leaving the question to the jury.³²⁶

Thus there is a relationship between the allocation of the burden on admissibility and the question of assigning the decision to the judge or to the jury. Essentially, Dean Wigmore wanted the jury to hear the statement, if it were "made in the party's presence or hearing."³²⁷ So, he asserted that the burden should be upon the opponent to show lack of "opportunity or motive to deny its correctness."³²⁸ It could be that in the normal course of events, a person would be expected to contradict a statement, and therefore, it is fairer and more efficient to ask that person to explain how this situation was not a normal one. Wigmore conceded that his position was not consistent with the case law, but he was placated because the same objective was often furthered by assigning the issue to the jury.³²⁹ Skeptics of the ability of juries to separate the two distinct issues and to refuse to consider a statement substantively unless they found it to have been adopted would argue that leaving the question to the jury undercuts the requirements of the exception if not the prohibition on hearsay itself.³³⁰

³²⁴ See *supra* note 318.

³²⁵ See C. MCCORMICK, *supra* note 4, § 53, at 125.

³²⁶ 4 J. WIGMORE, *supra* note 1, § 1071, at 106 (Chadbourn rev. 1972) (emphasis in original) (citations omitted). See *United States v. Moore*, 522 F.2d 1068, 1075-76 (9th Cir. 1975) (trial judge must in the case of admission by silence control the determination of preliminary facts), *cert. denied*, 423 U.S. 1049 (1976).

³²⁷ 4 J. WIGMORE, *supra* note 1 § 1071, at 106 & n.2 (Chadbourn rev. 1972). See, e.g., *United States v. Giese*, 597 F.2d 1170, 1195-96 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979).

³²⁸ 4 J. WIGMORE, *supra* note 1 § 1071, at 106 (Chadbourn rev. 1972).

³²⁹ *Id.*

³³⁰ FED. R. EVID. 801(d)(2)(B) & (C) raise FED. R. EVID. 104(a) issues. 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 424, at 292-294 (the risk of misuse requires that the judge determine the question of admissibility under FED. R. EVID. 801(d)(2) (B)). See also *Arpan v. United*

One case in which the division of function between judge and jury was extremely significant to the burden allocation was *O'Neal v. Morgan*.³³¹ O'Neal sued four New York City police officers seeking damages for the violation of her deceased husband's civil rights.³³² At trial she sought to introduce evidence of an admission allegedly made by one of two defendants, but she could not identify which one.³³³ The trial court excluded the evidence on the ground that it was not properly authenticated.³³⁴ Reversing, the Second Circuit held that the statement should be revealed to the jury, because it found that the circumstances were sufficient to support a finding that the declarant was one of the defendants.³³⁵ The court further held that each defendant would hear "the burden of persuading the jury that the admission was not made by him."³³⁶ The Court analogized to principles of *res ipsa loquitur*.³³⁷ A quasi-dissent is registered by the author of the opinion in a concluding footnote which expresses a preference for a resolution of the dispute pursuant to Rule 104(a), and insightfully suggests that the issue is really one of vicarious admission imputable to all four defendants.³³⁸

The court's position results in an anomaly. If the question is labeled as one relating to hearsay, then the burden of showing admissibility should be upon the proponent, and the decision should be one for the judge under Rule 104(a).³³⁹ On the other hand, if the question is viewed as one of authentication, then under Rule 901(a), the evidence should be given to the jury if there is sufficient evidence to support a finding that it is what it is purported to be.³⁴⁰ Even

States, 260 F.2d 649, 655 (8th Cir. 1958) (whether the circumstances of the making of a statement by a third party are such that would call for a prompt reply from the accused is for the judge to determine).

³³¹ 637 F.2d 846 (2d Cir. 1980).

³³² *Id.* at 847. The suit was brought under 42 U.S.C. § 1983 (1976). *Id.* at 847.

³³³ 637 F.2d at 849-51.

³³⁴ *Id.* at 850.

³³⁵ *Id.* at 850-51.

³³⁶ *Id.* at 851.

³³⁷ "We find the analogies sufficiently helpful to rely upon them at least for the limited purpose of developing a procedure for placing an admission in evidence in a multi-defendant civil trial." *Id.*

³³⁸ 637 F.2d at 853 n.8 (Newman, J.).

³³⁹ See *supra* note 330. But cf. CAL. EVID. CODE § 403(a)(4) (West 1966) (The proponent of the evidence has the burden of production as to the preliminary fact and the evidence is inadmissible unless the court finds there is evidence sufficient to sustain a finding of the preliminary fact when the proffered evidence is a statement or conduct of a person and the preliminary fact is whether that person made the statement or so conducted himself.).

³⁴⁰ See FED. R. EVID. 901(a) & advisory committee note. If the preliminary question is to be resolved under FED. R. EVID. 104(b), or its counterpart, FED. R. EVID. 901, then the proponent must adduce evidence sufficient to support a finding that the evidence is what it is purported to be. The result in *O'Neal* is explicable since there may be sufficient evidence to support findings that the admission was made by either of two defendants. The problem is that the jury will use the admission against all the defendants and the justification for assigning the decision to them rests on the theory that it is admissible only against one of them. The jury should be able to consider the statement against more than one defendant only if it is admitted as an authorized or agency admission, in which case the decision on admissibility is made under Rule 104(a). See *supra* note 338.

if the evidence goes to the jury, the proponent should still bear the burden of persuasion on the question of authentication.

O'Neal v. Morgan illustrates the influence of fairness and efficiency concerns upon the allocation of burdens. The court's decision, that each defendant bore the burden of detaching himself from the statement,³⁴¹ illustrates a rough fairness. Certainly the defendant who made the statement has more access to information on the disputed question than the plaintiff, and it is not unfair to cast the burden on him. The defendant who did not make the statement, however, does not have that "advantage," and therefore faces a difficult, if not impossible task. If the plaintiff has presented evidence sufficient to justify a finding that either defendant made the statement, then it may well be that it is more efficient to place the burden of persuasion on the opponent, who denies having made the admission. Therefore, although the policy concern of hearsay exclusion would lead to an assignment of the burden to the proponent of the statement, the *O'Neal* court was influenced by unacknowledged estimates of fairness and efficiency to reverse that allocation. Generally, for a statement to be established as an admission, the preliminary facts must be established by the proponent of the evidence. In most instances, the determination of these preliminary facts is to be made by the trial judge rather than by the jury, since juries may tend to treat the statement as substantive evidence before its admissibility is established. This rationale, however, may be less compelling in the case of adoptive admissions, and such determinations, therefore, should be made by juries. Finally, although policy generally mandates that the proponent show a given statement is an admission and therefore not hearsay, fairness and efficiency sometimes dictate that the burden be reversed and allocated to the opponent of the evidence.

(ii) The Records Exceptions: Rules 803(6), (7), (8)

The exception to the hearsay rule which has one of the longest pedigrees is the business records exception.³⁴² Business records generally satisfy the two underlying principles governing hearsay exceptions: necessity and reliability.³⁴³ Except for the part of Rule 803(6) which broadens the scope of records that are admissible under the exception,³⁴⁴ the Federal Rules adopt an orthodox statement of the exception.³⁴⁵ The record must be one of a "regularly

³⁴¹ See *supra* text and note at note 336.

³⁴² See 5 J. WIGMORE, *supra* note 1 § 1518 (Chadbourn rev. 1974).

³⁴³ See 5 J. WIGMORE, *supra* note 1 § 1420, at 251-52 (Chadbourn rev. 1974).

³⁴⁴ "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses . . ." FED. R. EVID. 803(6). See also *id.* advisory committee note.

³⁴⁵ See *id.* (follows the widely accepted Commonwealth Fund Act [in E. MORGAN *et al.*, THE LAW OF EVIDENCE 63 (1927)] and the UNIF. BUSINESS RECORDS AS EVIDENCE ACT, 9A U.L.A. 504 [1965].).

conducted business activity;" it must be "a regular practice of that business" to keep the record; the record must be based upon personal knowledge; and it must be made "at or near the time" of the event recorded.³⁴⁶ These prerequisites must be shown by the testimony "of the custodian or other qualified witness."³⁴⁷ The wording of the exception clearly places the burden upon the proponent of the evidence. Reliance on the wording led the Tenth Circuit, in *Vesper Construction Co. v. Rain for Rent, Inc.*,³⁴⁸ to affirm the exclusion of proffered records because, although the records³⁴⁹ had been prepared at the plaintiff's request, they were offered by the defendant without his having established the proper foundation.³⁵⁰ The proponent of the evidence must show that it is a business record which meets the requirements of the exception, if it is to be admitted.

Not only does the statement of the exception strongly imply that the burden is upon the proponent, but also that allocation is supported by policy, fairness, and efficiency. Since there is a general policy of exclusion of hearsay evidence, subject to particular exceptions, a proponent of hearsay must therefore escape the general prohibition by complying with a specific exception. Except in unusual cases, like *Vesper*, where the proponent initiated the preparation of the records, the proponent will have greater access to information about the circumstances of the origin and custody of the record, and therefore it is both fairer and more efficient to ask him to present it. Efficiency also is served by having the source of the record presented as a logical part of its introduction.

Satisfying the four essential prerequisites which qualify the evidence as a business record, however, will not guarantee admissibility, since Rule 803(6) provides only that such records are not excluded by the hearsay rule "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."³⁵¹ The other records exceptions, Rules 803(7) and (8), also expressly included the reference to trustworthiness in the rules as submitted to Congress by the Supreme Court.³⁵² In adopting this proviso

³⁴⁶ FED. R. EVID. 803(6). See 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 446, at 650-62.

³⁴⁷ FED. R. EVID. 803(6).

³⁴⁸ 602 F.2d 238 (10th Cir. 1979).

³⁴⁹ *Id.* at 242.

³⁵⁰ *Id.*

³⁵¹ FED. R. EVID. 803(6).

³⁵² FED. R. EVID. 803(6) and (8) were so qualified in the initial draft. 46 F.R.D. 161, 346, 347 (1969). In order to conform the exception for absence of entry, the drafters added the proviso to FED. R. EVID. 803(7) in 1971. See 51 F.R.D. 315, 420 (1971). There is some doubt whether the trustworthiness proviso applies to all three clauses of FED. R. EVID. 803(8); both the Rule and the Advisory Committee Notes are unclear. The Uniform Rules and state adaptations of the Federal Rules have been more precise. See, e.g., ARIZ. REV. ANN. RULES OF EVIDENCE, Rule 803(8) 1977 ("[u]nless the sources of information or other circumstances indicate lack of trustworthiness, records . . . setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law . . . , or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings . . ." [emphasis added]); ARK. STAT. ANN. §

granting discretion to the courts to exclude untrustworthy business records, the Advisory Committee indicated that it was wary of situations such as that in *Palmer v. Hoffman*, where the business record at issue was based upon information provided by someone who may not have had a motive to be accurate.³⁵³ The Committee concluded that the lack of a motivation to be accurate would cast doubt on the reliability of the business record, thereby undercutting the justification for the exception to the hearsay rule.³⁵⁴ The Advisory Committee correctly declined to focus inquiry on the existence of a motivation to be accurate; rather, it drafted the rule so that the broader question of trustworthiness would be the crucial concern.³⁵⁵ In doing so, the Committee incorporated other factors into the decision on admissibility, such as the record's timeliness and the qualifications of the source of the information.³⁵⁶

Despite the breadth of this exception to the business records exception,³⁵⁷ it is clear that the policy of the rule will limit the instances in which business records will be deemed untrustworthy. Judge Weinstein, in examining the policies underlying the trustworthiness provision, concluded that based on Rules 401 and 102, "as a general matter the rules favor making all relevant evidence available to the trier of fact."³⁵⁸ After discussing other sources of untrustworthiness,³⁵⁹ he states that "[t]he record, once admitted [into evidence] as reliable under 803(6) may, of course, be deemed so trustworthy as to enjoy a presumption."³⁶⁰ Although it is not entirely clear, he seems to say that a record which has satisfied the basic requirements of the exception is presumptively trustworthy, so that establishing the applicability of the excluding proviso is the responsibility of the opponent.³⁶¹ In another part of his discussion, Judge Weinstein analogizes the proviso to Rule 403, and suggests that a similar analysis should govern the decision on admissibility.³⁶² If that is an apt

28-1001, Rule 803(8) (1979); ("The following are not within this exception to the hearsay rule: . . . (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness."). Courts as well as commentators have concluded that the proviso does apply to all three clauses. See *United States v. Orozco*, 590 F.2d 789, 794 (9th Cir. 1979) (trustworthiness of records established by showing that custom agents had no motive to fabricate entries into a computer along with the trustworthiness of computers themselves), *cert. denied*, 439 U.S. 1049 (1978); 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 456, at 764-66.

³⁵³ 318 U.S. 109, 113-14 (1943). See *Hoffman v. Palmer*, 129 F.2d 976, 980 (2d Cir. 1942).

³⁵⁴ FED. R. EVID. 803(6) advisory committee note.

³⁵⁵ *Id.*; 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 447, at 672.

³⁵⁶ *Cf.* FED. R. EVID. 803(8) advisory committee note.

³⁵⁷ Certainly, an application of Rule 11 of the Model Code of Evidence would lead to the conclusion that the opponent must show lack of trustworthiness, since the wording of the proviso begins with the word "unless." See MODEL CODE OF EVIDENCE Rule 11 at notes 68 to 71, *supra* and accompanying text.

³⁵⁸ 4 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 803(6)[07], at 803-177.

³⁵⁹ See *id.*, at 803-179 (type of record, the manner of entry or keeping, or the qualifications of the entrant).

³⁶⁰ *Id.*

³⁶¹ See Cleary, *supra* note 23, at 16-20.

³⁶² 4 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 806(6)[07], at 803-178.

analogy, then the burden should be placed upon the opponent to justify exclusion of the evidence on the ground that it is untrustworthy.

Often, an objection that the proffered evidence lacks trustworthiness can be read as an invocation of the court's discretionary power to exclude evidence under Rule 403 as well as a claim that the requirements of the exception to the exclusion of hearsay are not met. In *Melville v. American Home Assurance Co.*,³⁶³ the Third Circuit reviewed a trial court ruling admitting two Federal Aviation Administration Airworthiness Directives.³⁶⁴ The trial court had held that the directives were "factual findings" which were subject to Rule 803(8)(C),³⁶⁵ and that, as public records "based on legal duty and authority, [they] contain[ed] sufficient circumstantial guarantees of trustworthiness to justify their use at trial."³⁶⁶ The defendants in this aircrash litigation were contending that the Directives depended upon the expertise of the agency for their reliability, and, as such, were expert opinions of persons whose qualifications could not properly be tested.³⁶⁷ In view of the liberalization of the Federal Rules with respect to expert testimony, the court rejected this argument, preferring to harmonize the hearsay exception with Rules 702 and 705, relating to the bases for expert testimony.³⁶⁸

The trial court noted that satisfaction of the basic requirements of Rule 803(8) raises "presumption[s] of reliability" which may be rebutted with evidence of untrustworthiness.³⁶⁹ The trial court noted that a specific challenge to the F.A.A.'s expertise might have been appropriate as evidence of untrustworthiness.³⁷⁰ The opponent's contention that official records containing expert opinion should never be accepted unless the declarant is present and his expertise subject to challenge, however, was rejected by the court.³⁷¹ The court of appeals agreed, noting first that the rules relating to expert evidence "provide a means of testing . . . [the] reliability" of official reports proffered pursuant to Rule 803(8).³⁷²

Before these objections may be recognized, however, the party challenging the validity of an official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness. . . . To allow objections to be sustained under Rules 702 and 705 without a showing of untrustworthiness would have the practical effect of nullifying the exception to the hearsay rule provided by rule 803(8)(C).³⁷³

³⁶³ 584 F.2d 1306 (3d Cir. 1978), *rev'd* 443 F. Supp. 1064 (E.D. Pa. 1977).

³⁶⁴ An Airworthiness Directive is an FAA-issued description of unsafe conditions in some products, which are likely to exist or may develop in other products of the same design. 443 F. Supp. at 1110 n.69. *See also* 14 C.F.R. § 39.1 (1981).

³⁶⁵ *See* FED. R. EVID. 803(8)(C).

³⁶⁶ *Melville v. American Home Assurance Co.*, 443 F. Supp. 1064, 1112 (E.D. Pa. 1977) (Becker, J.), *rev'd on other grounds*, 584 F.2d 1306 (3d Cir. 1978).

³⁶⁷ 443 F. Supp. at 1113.

³⁶⁸ 584 F.2d at 1316.

³⁶⁹ 443 F. Supp. at 1112.

³⁷⁰ *Id.* at 1113-14.

³⁷¹ *Id.*

³⁷² 584 F.2d at 1316; *see* FED. R. EVID. 702 & 705.

³⁷³ 584 F.2d at 1316 (citations omitted).

The Court concluded by commenting that, with respect to the particular facts before it: "We note that no evidence of untrustworthiness appears in the record."³⁷⁴

The Court's language is imprecise. To say that the opponent "must come forward with some evidence," if interpreted literally, is not to say that the opponent bears the burden of persuasion. The language implies only an allocation of a burden of production.³⁷⁵ Nevertheless, it is quite likely that the Court was assigning the burden of persuasion, especially since it noted in the following sentence that a showing of unreliability was necessary. Other courts have not distinguished between the burdens in this context, and they uniformly place them both upon the opponent.³⁷⁶ Thus, the proponent of a business or government record must establish the preliminary facts to show that the proffered evidence meets the requirements of the exception. The fact that evidence complies with the exception creates a presumption that is trustworthy. So, it is incumbent upon the opponent to show that the presumption is incorrect.

When the trustworthiness proviso is invoked, the underlying policy mandates that the opponent of the evidence bear the burden of demonstrating inadmissibility. Once the proponent has complied with the basic requirements of an exception, he has satisfied the basic policy of the hearsay rule. Only in an unusual case will such evidence then be untrustworthy.³⁷⁷ Therefore, the opponent should be the party obligated to show that this is an unusual case.³⁷⁸ Access to information, which is the determinant of fairness, however, points in the other direction. In demonstrating the applicability of the business records exception, the proponent has the initial burden, in part because he normally has greater access to information pertaining to the required elements of a business record. When the issue involves trustworthiness, it is no less clear that the proponent of the evidence maintains such greater access. Access to the information on the disputed point also is an element of efficiency, but efficiency also in-

³⁷⁴ *Id.* at n.16.

³⁷⁵ If satisfaction of the basic elements of the exception raises a "presumption" of reliability, then, under the Federal Rules, only the burden of production will be affected. *See* FED. R. EVID. 301 (presumption does not shift the burden of proof in the sense of the risk of nonpersuasion).

³⁷⁶ *See* *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 558 (6th Cir. 1978) (opponent of a police accident report bears the burden of proving its lack of trustworthiness), *cert. denied*, 441 U.S. 933 (1979); *United States v. Taxe*, 540 F.2d 961, 966 (9th Cir. 1976) (en banc) (opponents of copyright certificates offered to show the date of fixation did not offer proof of their lack of trustworthiness and therefore did not meet their burden), *cert. denied*, 429 U.S. 1040 (1977).

³⁷⁷ *See* FED. R. EVID. 803(6) advisory committee note. "Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if 'the sources of information or other circumstances indicate lack of trustworthiness.'" *Id.*

³⁷⁸ Another factor relevant to the allocation is convenience — the natural order of storytelling — which argues against placing the burden on the opponent because the proponent's presentation of its case is disrupted. This is outweighed, however, by the substantial waste of time that would be an inevitable result of requiring the proponent to prove that each document is trustworthy.

cludes a probability estimation, which, because untrustworthy business records are thought to be unusual, would lead to placing the burden upon the opponent. Despite the proponent's greater access to information, therefore, the burden of proving untrustworthiness is cast upon the opponent for reasons of both policy and efficiency.

(iii) Rule 804

(A) *Unavailability*

Several exceptions to the hearsay rule have historically been conditioned upon the unavailability of the declarant.³⁷⁹ The Federal Rules follow that tradition and improve upon it, by defining unavailability uniformly for the entire class of exceptions, instead of applying varying definitions for each exception as the common law authorities had done.³⁸⁰ Rule 804(a) defines unavailability as including (1) a valid claim of privilege; (2) persistent refusal to testify; (3) lack of memory; (4) death or illness; and (5) absence beyond process or reasonable reach.³⁸¹ Rule 804(b) then indicates the types of evidence that are not excludable by the hearsay rule "if the declarant is unavailable as a witness."³⁸² The wording clearly implies that the proponent of evidence as an exception under Rule 804(b) bears the burden of showing unavailability under Rule 804(a), and the courts have consistently followed the implication.³⁸³

In *United States v. Pelton*,³⁸⁴ defense counsel sought to introduce grand jury testimony, representing to the court that the attorney for the grand jury witness

³⁷⁹ See C. MCCORMICK, *supra* note 4, § 253, at 608.

³⁸⁰ See *id.* (determination of what satisfies the requirement of unavailability defined in connection with each of the exceptions has little to commend it).

³⁸¹ FED. R. EVID. 804(a). After illustrating kinds of unavailability, Rule 804(a) concludes: "A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying." *Id.* There has been little consideration of what constitutes "procurement or wrongdoing," and none on the allocation of burdens on this question. See 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 486, at 1068-74. Cf. CAL. EVID. CODE § 405, comment, Assembly Committee on Judiciary (West 1966):

Under this code, the proponent of a hearsay declaration has the burden of proof on the unavailability of the declarant as a witness . . . ; but the party objecting to the evidence has the burden of proving that the unavailability of the declarant was procured by the proponent in order to prevent the declarant from testifying.

Id.

³⁸² FED. R. EVID. 804(b).

³⁸³ See 11 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 804.02, at VIII-239 (2d ed. 1982). See also *United States v. Lynch*, 499 F.2d 1011, 1023 (D.C. Cir. 1974) (prosecution had burden of demonstrating that a witness was unavailable before her preliminary hearing testimony could be admitted); *People v. Enriquez*, 19 Cal. 3d 221, 235, 561 P.2d 261, 270, 137 Cal. Rptr. 171, 180 (1977) (burden of proof as to unavailability is on the proponent of the evidence). See also 5 J. WIGMORE, *supra* note 1, § 1414, at 237-38 (Chadbourn rev. 1974).

³⁸⁴ 578 F.2d 701 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978).

" 'indicated that he [would] advise her to invoke her privilege under the Fifth Amendment and refuse to testify' " at the subsequent trial.³⁸⁵ Counsel had not produced the declarant (although he had subpoenaed her), nor did he demonstrate more clearly her intended invocation of the privilege.³⁸⁶ The Eighth Circuit affirmed the trial court's exclusion,³⁸⁷ saying that the proponent had "utterly failed to carry the burden" of establishing unavailability.³⁸⁸ The court called proponent's showing "extenuated and circuitous," and ruled that the trial court had correctly excluded the evidence, since there was merely a "speculative basis for determining" unavailability.³⁸⁹ The *Pelton* court relied upon *United States v. Amaya*,³⁹⁰ in which the Fifth Circuit had upheld the admission of former testimony on the basis that the declarant had been sufficiently shown to be suffering from a memory loss so that his live testimony was unavailable.³⁹¹ The defendant, opposing the evidence, had unsuccessfully sought a continuance in order to allow expert testimony on the permanence of the memory loss.³⁹² It is not clear whether the opponent was prepared to present that expert testimony, or was asking the court to require a greater showing from the proponent. In any event, the trial court refused the continuance, and was affirmed.³⁹³ Each of these cases show that the court customarily allocates the burden of showing unavailability to the proponent of the evidence.

The policy basis for placing the burden of showing unavailability upon the proponent of hearsay under Rule 804 is clear.³⁹⁴ The congressional judgment, evidenced in the plain language of the Rule and in its legislative history,³⁹⁵ is clear, and the policy result for burden allocation logically follows. Nevertheless, fairness and efficiency concerns will vary on the facts of each case, so the policy implication, however clear, should not mandate a uniform result.

³⁸⁵ *Id.* at 709 (quoting from the record of proceedings below).

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 709-10.

³⁹⁰ 533 F.2d 188 (5th Cir. 1976).

³⁹¹ *Id.* at 191.

³⁹² *Id.* (Whether memory loss was actually permanent was not determinative, since the question was whether the loss would be of such duration that postponement would not be practical.). *But see* *People v. Williams*, 93 Cal. App. 3d 40, 54, 155 Cal. Rptr. 414, 421 (Dist. Ct. App. 1979) (In the absence of medical testimony whether physical or mental health of rape victim is temporary or permanent, the witness is presumed available.).

³⁹³ 533 F.2d at 192.

³⁹⁴ *See* 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 486, at 1024-25. While there is controversy as to whether some exceptions *should* require unavailability, there is no controversy that those exceptions in Rule 804(b) require the declarant to be unavailable and those in Rule 801(d) and 803 do not. *See id.*

³⁹⁵ *See* H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7105 (discussing requirement that "the proponent must *also* be unable to procure the declarant's *testimony*") (emphasis added); HOUSE COMM. ON THE JUDICIARY, REPORT ON THE PROPOSED FEDERAL RULES OF EVIDENCE, H.R. DOC. NO. 650, 93d Cong., 1st Sess., 12, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7088 ("The amendment is designed primarily to require that an attempt be made to depose a witness [as well as to seek his attendance] as a *precondition* to the witness being deemed unavailable.")

Given the trial court's broad discretion over all questions of admissibility, it should be possible to find leeway in a compelling case, to ask the opponent to make some showing of the availability of live testimony. In *Pelton*, for instance, the proponent had caused a subpoena to be issued for the witness, and had represented to the court a basis for his conclusion that the witness would be unavailable because of an assertion of privilege.³⁹⁶ The exclusion of the out-of-court testimony in this instance is defensible since claims of privilege can be overruled, and since the trial judge perhaps should rule on the claim of privilege only after seeing the witness. On the other hand, in situations in which a privilege clearly applies, going through the procedure is a futile gesture. Exclusion on the grounds set forth in *Pelton* would not be justified, unless the opponent of the hearsay proffer can show that the apparently applicable privilege does not exist. In such cases, the principle of efficiency calls for reliance on the representations of counsel.³⁹⁷ Similarly, in *Amaya*, memory loss had been established, and the only question was how long it would last.³⁹⁸ The proponent had already established a lack of memory, and therefore the precondition of unavailability was shown to exist. Thus, the court correctly held that the preference for live testimony is not strong enough to justify a continuance for the opponent to secure expert testimony on the issue of whether another continuance would alleviate the problem of unavailability.³⁹⁹ Purely on efficiency grounds, *Amaya* reached a justifiable result.

(B) *Statements Against Interest: Rule 804(b)(3)*

Three of the hearsay exceptions conditioned upon a showing of unavailability are essentially restatements of the more liberal common law trends.⁴⁰⁰

³⁹⁶ See *supra* text and notes at notes 385-89.

³⁹⁷ Cf. *Castilleja v. Southern Pac. Co.*, 445 F.2d 183, 186 ("It was within the discretion of the trial court to accept or reject counsel's representations[,] regarding unavailability"). See also *Bailey v. Southern Pac. Transp. Co.*, 613 F.2d 1385, 1390 (5th Cir.), *cert. denied*, 449 U.S. 836 (1980).

³⁹⁸ *United States v. Amaya*, 533 F.2d 188, 191 (5th Cir. 1978).

³⁹⁹ *Id.*

⁴⁰⁰ FED. R. EVID. 804(b)(1) (former testimony); 804(b)(2) (dying declaration); 804(b)(4) (statement of personal or family history).

The exception for former testimony is subject to a number of prerequisites, the most problematical being that the opponent, "the party against whom the testimony is now offered," must have had "an opportunity and similar motive to develop the testimony" at the prior hearing. FED. R. EVID. 804(b)(1). It seems anomalous to require the proponent of evidence to establish his opponent's motive and opportunity at an earlier proceeding. The courts, however, have not experienced any problems with respect to the burden on admissibility in implementing this section of the rule. Such difficulty does not arise because the cases consider prior proceedings categorically, and easily infer opportunity and similar motive, even in proceedings for purposes unrelated to the purposes of the present trial. See generally 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 487, at 1085-1111; 4 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 804(b)(1) [02]-[05], at 805-57-75. The opportunity to develop testimony is easily found, if the opponent, "the party against whom the testimony is now offered," has ever confronted the witness before on the same issues. The opportunity also will be found even if the previous testimony was not subject to cross-

The exception for statements against interest,⁴⁰¹ however, caused more controversy. The policy favoring the admissibility of statements against interest is based upon the assumption that a reasonable person would not make such a statement unless he believed it to be true.⁴⁰² Since that guarantee of reliability is the underlying rationale, to implement that policy, the proponent of a statement who relies upon this exception should show that the statement was self-damaging when made, in order to demonstrate the reliability which is the basis for its admissibility. In addition to establishing unavailability, under the language of the rule the proponent must show that the statement was either contrary to the declarant's pecuniary or proprietary interest, or subjected him to civil or criminal liability.⁴⁰³ As the Advisory Committee observed, that the

examination; a chance to examine directly is enough. *See id.*, ¶ 804(b) (1) [03]. The burden on the proponent to show opportunity is not particularly onerous.

It is "similar motive" which is more troubling, particularly in criminal cases when the former testimony is from a preliminary hearing. *See* 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 487, at 1091-94. The sole stated purpose of a preliminary hearing is to determine probable cause to justify further proceedings. *See* FED. R. CRIM. P. 5.1. In addition to attempting to defeat the showing of probable cause, in a preliminary hearing, defense counsel often tries incidentally to discover the prosecution case. Perhaps he will also attempt to fix testimony for possible later use in impeachment. These varying motives, however, are rarely considered dispositive. The burden is formally upon the proponent to establish the elements of the exception. In reality, this burden has not proven to be heavy.

The specific exception for dying declarations, codified in Rule 804, has perhaps the longest and most tortuous history. *See* C. MCCORMICK, *supra* note 4, §§ 281-287, at 680-85; 5 J. WIGMORE, *supra* note 1, §§ 1430-52, at 275-321 (Chadbourn rev. 1974). At common law, use of the exception was restricted to homicide cases. The statement had to be made while the victim believed that death was imminent, and it had to concern the cause of death. Death was the only type of unavailability which would justify admission. *See* C. MCCORMICK, *supra* note 4, §§ 281-83. The Federal Rule expands the applicability of the exception. If the declarant is unavailable for any of the reasons listed in Rule 804(a), that will suffice; he need not be dead. The statement still must be made by the declarant "while believing that death is imminent," and its subject must concern the cause or circumstances of his apparently impending death. The subject of the statement will normally be evident from its content, so in addition to unavailability, the proponent generally need establish only the declarant's belief in his impending death.

The policy for placing this responsibility upon the proponent is directly related to the reliability justification for admitting the evidence. The non-secular justification emphasizes the solemnity of the deathbed scene which enhances reliability. 5 J. WIGMORE, *supra* note 1, § 1438, at 289 (Chadbourn rev. 1974). Later theorists focus more on psychological factors such as the uncertainty, and the absence of motive to falsify. *Id.* § 1443, at 302-03 (Chadbourn rev. 1974). *See also* Wilson v. State, 86 Nev. 320, 325, 468 P.2d 346, 350 (1970) (proponent not required to establish deceased declarant's belief in God). Despite criticism that a statement in such circumstances may not be reliable, *see generally* Stewart, *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Rules of Evidence*, 1970 UTAH L. REV. 1 (1970), the historical roots of the exception are deep, and the necessity for the evidence is clear. Thus, the hearsay rule will not exclude it if the proponent satisfies the requirements of the exception. Other objections can be made to the evidence, however, under Rules 602, 701, and of course 403. *See* FED. R. EVID. 804(b) (2) advisory committee note (objections to declarations phrased in terms of opinion may be raised under FED. R. EVID. 701 and objections to a lack of firsthand knowledge may be raised under FED. R. EVID. 602).

⁴⁰¹ FED. R. EVID. 804(b) (3).

⁴⁰² *See id.* advisory committee note.

⁴⁰³ *See* FED. R. EVID. 804(b) (3) and advisory committee note.

statement be against interest is "a condition precedent to admissibility."⁴⁰⁴ The burden is not onerous, and always can be satisfied by an examination of the statement and the circumstances of its making. The test of interest is an objective one: "that a reasonable man in his position would not have made the statement unless he believed it to be true."⁴⁰⁵

The drafters of the Rule expanded the common law exception by adding criminal liability as an interest which guaranteed the reliability of statements.⁴⁰⁶ In order to allay fears about the expansion of the common law exception, however, the Advisory Committee added a limitation: "A statement tending to exculpate the accused is not admissible unless corroborated."⁴⁰⁷ The Advisory Committee observed that "the provision is cast in terms of a requirement preliminary to admissibility. The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication."⁴⁰⁸ Congress, sharing this concern, made the requirement of corroboration even more stringent.⁴⁰⁹ As enacted, the Rule provides that a statement against penal interest which tends to exculpate the accused "is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."⁴¹⁰ The concern for the reliability of such statements, which was more intense in Congress than in the Advisory Committee, clearly indicates that the proponent must show trustworthiness. Professor Kaplan, to the contrary, raised the possibility that "it is the opponent rather than the proponent who has the burden of persuasion," but he conceded that "the issue is far from clear."⁴¹¹ With respect to the exception for statements against penal interest, in light of the rule's unequivocal legislative history, the resolution of the issue is clear, and the burden is upon the proponent.

The requirement that the trustworthiness of a statement tending to exculpate the accused be "clearly indicate[d]" by corroborating circumstances may be interpreted as affecting the standard of persuasion which is imposed.⁴¹² If the congressional addition of "clearly" to the trustworthiness requirement affects the standard of persuasion, however, there may be constitutional prob-

⁴⁰⁴ FED. R. EVID. 804(b) (3) advisory committee note.

⁴⁰⁵ FED. R. EVID. 804(b) (3).

⁴⁰⁶ 56 F.R.D. 183, 321 (1972).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 327.

⁴⁰⁹ H.R. REP. NO. 93-650, 93d Cong., 1st Sess., 15-16, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7089-90.

⁴¹⁰ FED. R. EVID. 804(b) (3). The drafters of the Rules objected specifically to the addition of the word "clearly," stating that it "imposes a burden beyond those ordinarily attending the admissibility of evidence, particularly that offered by accused persons." See 4 J. WEINSTEIN & M. BERGER, *supra* note 41, at 804-13.

⁴¹¹ Kaplan, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987, 994 n.9 (1978).

⁴¹² See *supra* note 410. See also *Chambers v. Mississippi*, 410 U.S. 284, 297-98 (1973) (defendant proffered statement by third party; state evidence law did not include penal interest as basis for admissibility; exclusion held to violate due process).

lems as well as confused policy. The fundamental fairness guaranteed by the due process clause may require that exculpatory evidence be admitted.⁴¹³ An alternative interpretation is possible. The terms of Rule 804(b)(3) require the proponent of a statement against penal interest which exculpates the defendant to convince the judge by a preponderance of the evidence that corroborating circumstances clearly indicate the trustworthiness of the statement. So interpreted, the Rule does not impose a more rigorous standard of persuasion, it merely states the proposition of which the decisionmaker must be convinced. This analysis saves the Rule from being unrealistically stringent and thereby subject to constitutional attack. It also preserves the exception from becoming a nullity, largely unusable by criminal defendants.

Judge Weinstein notes that the requirement of corroboration "has been interpreted so stringently that it is difficult to conceive of the Rule having much utility."⁴¹⁴ In his analysis of Rule 804(b)(3), Judge Weinstein criticizes *United States v. Bagley*,⁴¹⁵ in which the Fifth Circuit affirmed the trial court's exclusion of a statement proffered under Rule 804(b)(3).⁴¹⁶ Bagley, a federal prisoner, was charged with possession of heroin with intent to distribute it.⁴¹⁷ He offered the statement of another prisoner, Schropshire, who had since died, to his cellmate Duke, to the effect that he had given Bagley the heroin by mistake, having intended to give him Valium.⁴¹⁸ The trial court held that, since the statement was to Schropshire's cellmate, it was not against penal interest, but the Fifth Circuit disagreed.⁴¹⁹ The court of appeals, however, held that the trial judge's finding that the corroboration requirement had not been met was not clearly erroneous, and affirmed.⁴²⁰

After a discussion of the scope of appellate review,⁴²¹ the Court divided the trustworthiness requirement into two components. First, "the statement must afford a basis for believing the truth of the matter asserted," and the court found that element to have been satisfied.⁴²² Second, trustworthiness is concerned with "whether a statement offered to exculpate an accused was actually made."⁴²³ On this issue, the court held that the trial judge's ruling must be sustained because Duke, the proffered witness, was the only person who heard

⁴¹³ Raising the standard of persuasion necessarily makes it more difficult to get the evidence admitted. As the *Chambers* decision indicated, exclusionary rules of evidence which prevent the presentation of a defense may run afoul of the values expressed in the Compulsory Process clause of the sixth amendment. See *supra* note 412.

⁴¹⁴ 4 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 804(b)(3) [03], at 804-108.

⁴¹⁵ 537 F.2d 162 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977). The criticism is reciprocated. See *id.*, at 168.

⁴¹⁶ *Id.* at 164.

⁴¹⁷ *Id.*; see 21 U.S.C. § 841(a)(1)(1976).

⁴¹⁸ 537 F.2d at 164.

⁴¹⁹ *Id.* at 165.

⁴²⁰ *Id.*

⁴²¹ *Id.* at 165-67 (holding that clearly erroneous standard applies; trial court decision without findings should be upheld if any reasonable view of the evidence supports its ruling).

⁴²² *Id.* If the statement was actually made, there is no reason to doubt its veracity. *Id.*

⁴²³ *Id.*

it, and could no longer hurt his now-dead cellmate, Schropshire, by fabricating a statement to exculpate his still-living friend, Bagley.⁴²⁴ In addition, neither Duke, nor the six other witnesses proffered by Bagley had mentioned Valium until shortly before Bagley's trial, and all the witnesses, as prisoners, had been convicted of crimes, and were therefore less worthy of belief.⁴²⁵ The court explicitly relied upon the congressional changes in Rule 804(b)(3), particularly the addition of the word "clearly."⁴²⁶ The court had no doubt that the responsibility for establishing the two elements of trustworthiness was upon the proponent of the statement.⁴²⁷

Bagley can be read narrowly, as classic appellate obeisance to trial court discretion,⁴²⁸ or it can be interpreted as imposing a strict standard for the admission of statements exculpating the accused.⁴²⁹ Later cases have deferred to the trial court's discretion, while noting that the corroboration requirement is a substantial one.⁴³⁰ The standard, however, should not be "so strict as to be utterly unrealistic."⁴³¹ Furthermore, courts should consider the impact of constitutional restrictions on limiting the accused's presentation of evidence.⁴³² In *United States v. Thomas*,⁴³³ the trial court had concluded that a proffered statement was not against the declarant's penal interest.⁴³⁴ The court of appeals reversed this finding,⁴³⁵ and, therefore, examined the trustworthiness issue. Since the trial court had not addressed the trustworthiness question, the court of appeals was able to evade *Bagley*'s restriction on the scope of appellate

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 167-68.

⁴²⁶ *Id.* As Judge Weinstein notes, several of the factors identified by the *Bagley* court on the question of whether the statement was actually made relate to the credibility of the witness, an issue particularly suited to jury determination. See 4 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 804(b) (3) [03], at 804-108-09; 537 F.2d at 167-68. See also CAL. EVID. CODE § 403(a) (4) (West 1966) (assigns a preliminary issue to the jury, if the "preliminary fact is whether that person made the statement").

In *Huff v. White Motor Corp.*, 609 F.2d 286, 293 (7th Cir. 1979), The Court of Appeals for the Seventh Circuit rejected the view that the reliability of the witness' testimony, that the statement was made, constituted part of the trustworthiness requirement. *Id.* at 293. See *infra* text and notes at notes 453-66.

In *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978), the Fifth Circuit relied upon the *Bagley* reasoning to impose identical requirements of corroboration upon statements offered by the prosecution to inculpate the accused. *Id.* at 701. While Rule 804(b) (3) does not so limit inculpatory statements, the court did so on the basis of the constitutional right of confrontation. *Id.* at 700-01. See also *United States v. Riley*, 657 F.2d 1377, 1383 (8th Cir. 1981).

⁴²⁷ 537 F.2d at 167-68.

⁴²⁸ *Id.* at 167. See also *United States v. Barrett*, 539 F.2d 244, 253 (1st Cir. 1976) (rule confides to the trial court "a substantial degree of discretion").

⁴²⁹ *Cf.* *United States v. Barrett*, 539 F.2d 244, 253 (1st Cir. 1976).

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ 571 F.2d 285 (5th Cir. 1978).

⁴³⁴ *Id.* at 288. A co-defendant's statement exculpating the defendant which was made at the close of the preliminary hearing and overheard by the United States magistrate, attorneys and a reporter was held inadmissible.

⁴³⁵ *Id.*

review.⁴³⁶ There was little doubt that the statement had been made; the witness proffered to testify to it was a federal magistrate.⁴³⁷ After reviewing the circumstances in the record, the Fifth Circuit concluded that trustworthiness was clearly indicated.⁴³⁸

It would be unfortunate if the courts of appeals were to follow *Bagley*'s restriction on the scope of appellate review.⁴³⁹ Such a course would deprive trial courts of the benefit of guidance to distinguish circumstances which corroborate from those which do not. If that approach takes hold, then appellate consideration of the trustworthiness requirement will be, as in *Thomas*, happenstantial.⁴⁴⁰

As for the allocation of the burden, the policy bases for assigning it to the proponent conflict. If all relevant evidence should be admissible unless clearly excluded, then the burden should be upon the opponent. Hearsay, however, should be excluded unless the proponent carries the burden of showing the applicability of an exception. Even when the proponent has satisfied the basic requirements for admission of a statement against interest, however, Congress has removed the presumption of trustworthiness for the class of statements tending to exculpate the accused. Thus, the policy articulated by Congress erects an additional hurdle which must be overcome by the proponent of such statements. Once again, questions of fairness and efficiency will vary widely with the circumstances of each case. The policy choice explicit in the Rule cannot be ignored, but perhaps it can be accommodated even when concerns of fairness and efficiency point to a different allocation of the burden. It is clear that due process requires that the prosecution reveal exculpatory evidence upon defense request.⁴⁴¹ This requirement should be interpreted so as to impose upon the prosecution the duty to reveal evidence of corroborating circumstances, which would support a finding of trustworthiness. If evidence of corroboration were revealed to the defendant-proponent, fairness and efficiency would be served, and the proponent will be able to satisfy more easily the burden assigned in compliance with the congressional policy choice.

Thus, the proponent of a declaration against interest bears the burden of persuasion on several preliminary facts: unavailability, the against interest requirement, and in the case of statements tending to exculpate the criminal defendant, the corroboration of trustworthiness. Only by applying the due process requirement upon the prosecution to reveal exculpatory evidence, can fairness concerns be made consistent with the policy.

⁴³⁶ *Id.* at 290.

⁴³⁷ *Id.* at 288.

⁴³⁸ *Id.*

⁴³⁹ See *supra* note 421.

⁴⁴⁰ The only reason that the appellate court in *Thomas* was able to reach the issue of corroborating circumstances was that trial court, having held that the proffered statement was not against penal interest, did not need to address the corroboration requirement. *Id.* at 290. See *supra* text and note at note 438.

⁴⁴¹ *Brady v. Maryland*, 373 U.S. 83, 86 (1963). See *United States v. Agurs*, 427 U.S. 97, 103-07 (1976).

(iv) "Great Hearsay:" Rules 803(24) and 804(b)(5)

As they emerged from Congress, Rules 803, dealing with hearsay generally, and 804, dealing with hearsay when the declarant is unavailable, each contained a residual exception for "great hearsay,"⁴⁴² that is, evidence which did not meet the requirements of any of the enumerated exceptions, but which was reliable enough to justify admission.⁴⁴³ As submitted by the Supreme Court, the exceptions were to apply to "a statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."⁴⁴⁴ The House rejected the provisions "as injecting too much uncertainty into the law of evidence."⁴⁴⁵ The Senate reinstated them, but changed "comparable" to "equivalent" in modifying "circumstantial guarantees of trustworthiness" and added several additional requirements for admissibility.⁴⁴⁶

To be admitted, therefore, a statement must (1) have circumstantial guarantees of trustworthiness equivalent to those in the enumerated exceptions;⁴⁴⁷ (2) be evidence of a material fact;⁴⁴⁸ and (3) be more probative than any other evidence which the proponent can reasonably procure.⁴⁴⁹ Furthermore, admission must serve "the general purposes of these rules and the interests of justice."⁴⁵⁰ Also, the proponent must provide sufficient advance notice to enable the opponent to prepare, either to contest admissibility, or to meet the evidence.⁴⁵¹

⁴⁴² See Waltz, *Present Sense Impressions and the Residual Exceptions: A New Day for "Great" Hearsay?*, 2 LITIGATION 22, 24 (1975). See also D. LOUISELL, J. KAPLAN, & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 260 (4th ed. 1981).

⁴⁴³ FED. R. EVID. 803(24), 804(b) (5).

⁴⁴⁴ 56 F.R.D. 183, 303 & 322 (1972).

⁴⁴⁵ H.R. REP. NO. 93-650, 93d Cong., 1st Sess., 5-6, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7079.

⁴⁴⁶ S. REP. 93-1277, 93d Cong., 1st Sess., 18-20, reprinted in 1974 U.S. CODE CONG. & AD. NEWS, 7051, 7065-66. The Senate provision prevailed, but the Conference Committee added a notice requirement. H.R. REP. 93-1597, 93d Cong., 1st Sess. 11-12, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 7098, 7105.

⁴⁴⁷ FED. R. EVID. 803(24) & 804(b) (5).

⁴⁴⁸ FED. R. EVID. 803(24) & 804(b) (5). The better reading of the materiality requirement simply subjects the proffer to the relevance requirements of FED. R. EVID. 401. See *Huff v. White Motor Corp.*, 609 F.2d 286, 294 & n.13 (7th Cir. 1979) (applies Rule 401 in a Rule 803(24) context). Hence the requirement is surplusage. See D. LOUISELL & C. MUELLER, *supra* note 9, § 472, at 934; 4 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 803(24) [01], at 803-293.

⁴⁴⁹ FED. R. EVID. 803(24) & 804(b) (5).

⁴⁵⁰ FED. R. EVID. 803(24) & 804(b) (5). Cf. FED. R. EVID. 102. Although inspiring, the requirement is not significant. See 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 472, at 939-41 & n.94 (this requirement has not proved significant in decisions regarding FED. R. EVID. 803(24)); 4 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 804(24) [01], at 803-294; 11 J. MOORE, MOORE'S FEDERAL PRACTICE, § 803(24) [7], at VII-210.

⁴⁵¹ FED. R. EVID. 803(24) & 804(b) (5). How strictly this procedural requirement should be enforced is a question which has received varying responses. Compare *United States v. Ruffin*, 575 F.2d 346, 358 (2d Cir. 1978) (FED. R. EVID. 802(24) can only be used when notice has been given) with *United States v. Bailey*, 581 F.2d 341, 348 (3d Cir. 1978) (if the proponent of the evidence is without fault in failing to provide notice and the trial judge has granted a continuance

A cogent analysis of the residual exceptions⁴⁵² is contained in the Seventh Circuit's decision in *Huff v. White Motor Corp.*⁴⁵³ In this wrongful death action, the defendant offered a statement by the deceased about the cause of the accident which resulted in his death.⁴⁵⁴ The trial court was affirmed in its rejection of the assertion that the evidence was an admission,⁴⁵⁵ and the appellate court refused to consider White Motor's contention that the evidence was a statement against interest, since the contention had not been raised at trial.⁴⁵⁶ Although acknowledging the trial court's considerable discretion on the issue of the residual exception, the court of appeals did review the record with a view toward exercising its own independent discretion, since no explicit ruling had been made on the availability of residual exception, and since no findings had been recorded.⁴⁵⁷ The court examined all five of the requirements for admissibility, but focused on the two substantive ones: the trustworthiness of the evidence, and its probative value relative to other accessible evidence.⁴⁵⁸ The court found that the statement by plaintiff's decedent had "equivalent circumstantial guarantees of trustworthiness," because the statement was not ambiguous, it was made within a few days of the accident, and it was contrary to the declarant's pecuniary interest.⁴⁵⁹ There was some question, however, about the declarant's mental competence at the time of making the statement, so the court remanded for a determination by the trial judge of the competence of the declarant, noting that "[t]he burden is on the proponent of the evidence to prove capacity by a preponderance of the evidence."⁴⁶⁰

The allocation of this burden to the proponent is curious but correct. Mental capacity of a witness testifying before the jury is not a prerequisite for admitting the testimony, so usually, any proof on the issue of capacity is submitted, if at all, by the opponent of a witness. Under the Federal Rules,

to allow the opponent of the evidence time to prepare to contest its admission, the notice requirement of FED. R. EVID. 803(24) has been met).

⁴⁵² Courts have frequently analyzed the identical provisions simultaneously. See, e.g., *United States v. Kim*, 595 F.2d 755, 765 n.45 (D.C. Cir. 1979). See also 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 472, at 922.

⁴⁵³ 609 F.2d 286 (7th Cir. 1979).

⁴⁵⁴ *Id.* at 290.

⁴⁵⁵ *Id.* The statement was proffered as an admission on the basis that the declarant was in privity with the plaintiff. *Id.* See C. MCCORMICK, *supra* note 4, § 268, at 647. The court rejected that argument, since Rule 801(d) (2) does not exclude privity-based admissions from the hearsay ban. *Id.* at 291. Therefore, such statements must meet one of the hearsay exceptions to be admitted. *Id.*

⁴⁵⁶ *Id.* at 290 & n.2. In addition, no mention was made of the dying declaration exception under FED. R. EVID. 804(b) (2). *Id.*

⁴⁵⁷ *Id.* at 291. Cf. *supra* text and notes at notes 428-40.

⁴⁵⁸ 609 F.2d at 292-95. The court acknowledged the notice, materiality, and interests of justice provisions, and held that they had been satisfied. *Id.* at 294-95.

⁴⁵⁹ *Id.* at 292-94. The court did not include either the reliability of the witness' testimony or corroboration of the truth of the statement as factors relevant to admissibility. *Id.*

⁴⁶⁰ *Id.* at 294. The court acknowledged that competence of a witness was clearly a question of credibility for the jury under FED. R. EVID. 601 and Indiana law, but held that the determination of trustworthiness was one for the judge under FED. R. EVID. 104(a). *Id.* at 293-94 & n.12.

moreover, the only limitations on an incompetent witness testifying would be that of Rule 403, with the burden upon the opponent, or perhaps in an extreme case, that of Rule 401, with a relatively light burden upon the proponent.⁴⁶¹ In *Huff*, however, the declarant was not present before the jury, nor did the statement comply with the requirements of any specific hearsay exception.⁴⁶² So the proponent must show trustworthiness, and therefore must show mental capacity.⁴⁶³ The court of appeals noted the possible inadequacy of the record, and invited the trial court to permit the parties to present evidence on the question of mental capacity.⁴⁶⁴ The court only briefly analyzed the requirement that the statement must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."⁴⁶⁵ In this case, the requirement was easily met; the declarant was alone at the time of the accident, so his statement was the most salient evidence of the circumstances.⁴⁶⁶

Other cases have presented more difficulty for the proponent. In *United States v. Kim*,⁴⁶⁷ the defendant offered a telex from a Korean bank as evidence that he did not have serious financial problems, to rebut the prosecution's evidence that he did have such problems.⁴⁶⁸ The District of Columbia Circuit affirmed the exclusion of the telex message, holding that, not only did the proffer fail to meet the trustworthiness requirement, but also it did not meet the relative probativeness requirement.⁴⁶⁹ The evidence, the court implied, would be relevant under Rule 401, but it was not as probative as "actual business records," or the testimony of associates on the sources of defendant's income.⁴⁷⁰ Since the proffered evidence was not more probative than other reasonably attainable evidence it was excluded.⁴⁷¹

The policy underlying the residual exception is clear: "Congress intended the exception to apply in a very few cases in which the evidence is very important and very reliable."⁴⁷² The congressional hostility to the catchall provisions, and their hedging with preliminary requirements support this policy conclusion.⁴⁷³ With respect to evidence proffered under these subdivisions, the

⁴⁶¹ See *infra* text and notes at notes 487-91.

⁴⁶² 609 F.2d at 290. The statement may have met the requirements of FED. R. EVID. 804(b) (3), but that provision was not invoked at trial. If it had been, then the burden would have been upon the opponent to show lack of mental capacity, in order to have the judge exclude the evidence pursuant to FED. R. EVID. 403. See 4 D. LOUISELL & C. MUELLER, *supra* note 9, § 489, at 1133 & n.67. See also *supra* text and notes at notes 124-31.

⁴⁶³ 609 F.2d at 294. "If that mental capacity was lacking, so are the guarantees of trustworthiness." *Id.*

⁴⁶⁴ *Id.* at 294.

⁴⁶⁵ *Id.* at 294-95. See FED. R. EVID. 803(24) & 804(b) (5).

⁴⁶⁶ 609 F.2d at 295.

⁴⁶⁷ 595 F.2d 755 (D.C. Cir. 1979).

⁴⁶⁸ *Id.* at 759.

⁴⁶⁹ *Id.* at 765-66.

⁴⁷⁰ *Id.* at 766.

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ See *supra* text and notes at notes 445-46.

hostile policy should predominate over the factors of fairness and efficiency in all but the most extreme cases. The proponent can justly be required to show guarantees of reliability similar to guarantees which support the admission of evidence under specific exceptions. The requirement of heightened probative value ensures that the evidence is necessary. The evidence must be more than merely relevant; it must be more persuasive than any other reasonably obtainable evidence. Considering the lack of conventional guarantees of reliability, the requirements are not too onerous.

B. *Qualification of Witnesses*

1. Capacity

At common law, there were a variety of categories of people who would not be permitted to testify, based upon mental disability, infancy, conviction of a crime, religious belief, or interest in the outcome of the case.⁴⁷⁴ These categorical exclusions of witnesses gradually have been rejected over the past 150 years,⁴⁷⁵ as courts came to regard them as irrational. Before their complete rejection, in order to restrict the exclusion of witnesses, the courts placed the burden of establishing incompetency upon the party objecting to the witness.⁴⁷⁶ The policy of full exposition of facts by witnesses supplanted the policies underlying ancient rules of incompetency, and the more modern policy was served by manipulation of the burdens on the preliminary question.⁴⁷⁷ The allocation to the objecting party was followed in the United States,⁴⁷⁸ without

⁴⁷⁴ See 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 251 (competency restrictions include: mental disability; immaturity; prior conviction [infamy]; interest; marital relation; religious belief).

⁴⁷⁵ See *Rosen v. United States*, 245 U.S. 467, 470 (1918) ("in light of general authority and sound reason," Court rejects common law disqualification for prior conviction); C. MCCORMICK, *supra* note 4, § 61, at 139 (common law rules of incompetency have undergone such change that most of the former ground rules for excluding witnesses have been converted to grounds for impeachment); 2 & 3 J. WIGMORE, *supra* note 1, §§ 483-721 (Chadbourn rev. 1979, 1970).

⁴⁷⁶ See *People v. Farley*, 90 Cal. App. 3d 851, 868-69, 153 Cal. Rptr. 695, 705 (Cal. App. 1979) (burden is on opponent of the witness when attempting to disqualify for incapacity); *People v. Craig*, 111 Cal. 460, 469, 44 P. 186, 188 (1896) (burden is on the opponent of the witness when attempting to disqualify for incompetency); *Clealand v. Huey*, 18 Ala. 343, 346 (1850) (burden is on the opponent of the witness when attempting to disqualify for interest); *Rex v. Bray*, 95 Eng. Rep. 232, 233-34 (K.B. 1736) (burden is on the opponent when attempting to disqualify for interest). See also 2 J. WIGMORE, *supra* note 1, § 484, at 642 (Chadbourn rev. 1979) (stating generally when burden is on opponent when attempting to disqualify); § 497, at 703 (burden is on opponent when attempting to disqualify for incapacity); § 584 (burden is on opponent when attempting to disqualify for interest).

⁴⁷⁷ In the early eighteenth century, the Court of the King's Bench indicated that the burden of demonstrating disqualification of a witness on the basis of an interest in the outcome of the case was on the party objecting to his testimony. *Rex v. Bray*, 95 Eng. Rep. 232, 233-34 (K.B. 1736). When the judge was persuaded that the witness was incompetent, the rule of exclusion was observed. The rule, however, was subverted by the allocation of the burden of persuasion on the question of competency.

⁴⁷⁸ See, e.g., *Hulshart v. Hart*, 1 N.J.L. 62, 62 (1790) (defendant cannot lose the benefit of a witness on a bare allegation of interest). See also W. BEST, *THE PRINCIPLES OF THE LAW OF EVIDENCE*, §§ 142-43, at 131 (Phipson ed. 1922).

any explicit discussion of the reason for it, except to say that competency was presumed until the contrary was proven.⁴⁷⁹ The rejection of evidence on any of the bases of incompetency is now nearly universally regarded as irrational,⁴⁸⁰ but evidence which formerly rendered a witness incompetent can still generally be used to impeach credibility.⁴⁸¹ The treatment of competency disputes provides a valuable insight into allocating the burden in order to foster, or to obstruct, the application of a legal principle.

Federal Rule 601 eliminates the incongruity by eliminating categorical incompetencies.⁴⁸² Witnesses who are under the influence of drugs,⁴⁸³ or who may be mentally disturbed⁴⁸⁴ are not incompetent under the Rule. In extreme cases, however, the court can exclude testimony from such witnesses as failing to meet the minimum standard of relevance under Rule 401,⁴⁸⁵ or by ruling that its probative value is substantially outweighed by the considerations enumerated in Rule 403.⁴⁸⁶ If minimal relevance is the issue, then, consistent with Rule 401, the burden of establishing probative value will rest upon the proponent to show that the testimony of this witness will make a fact of consequence to the action more probable than it would be without the testimony.⁴⁸⁷ On the other hand, if relevance is established, then the opponent of the witness will bear the burden of showing that the evidence should be excluded under Rule 403.⁴⁸⁸ When there is an objection that the probative value of the evidence is substantially outweighed by the danger of confusion, or by the other factors enumerated in Rule 403, then under that Rule, it is the opponent of the witness who must justify the trial court's use of its power to exclude.⁴⁸⁹

Despite the absolute language of Rule 601, trial judges continue to use the concept of incompetency to exclude witnesses altogether. In *United States v. McRary*,⁴⁹⁰ for example, the trial court ruled that a defense witness who had been found incompetent to stand trial was therefore incompetent to testify for

⁴⁷⁹ See *Densler v. Edwards*, 5 Ala. 31, 34, (1843).

⁴⁸⁰ See Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89, 105-08 (1963). See also 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 601[03], at 601-17 (modern trend in all jurisdictions has been to abrogate ancient rules of disqualification).

⁴⁸¹ See C. MCCORMICK, *supra* note 4, § 61, at 139. But see FED. R. EVID. 610 (prohibiting use of religious belief to impeach a witness).

⁴⁸² FED. R. EVID. 601. "Every person is competent to be a witness except as otherwise provided in these rules." *Id.* There are specific rules concerning the trial judge and jurors as witnesses. See FED. R. EVID. 605-606.

⁴⁸³ See *United States v. Callahan*, 442 F. Supp. 1213, 1221 (D. Minn. 1978) (witness who took narcotics on day he testified not automatically incompetent to testify).

⁴⁸⁴ See *United States v. McRary*, 616 F.2d 181, 183 (5th Cir. 1980) (wife who suffered from a mental illness not automatically incompetent to testify).

⁴⁸⁵ See 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 252, at 17-19 (where a witness labors under a great incapacity, testimony may so lack probative value that it is irrelevant); 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 601[04], at 601-28 (since the testimony of incompetents may lack probative value, the judge under rule 401 may exclude such evidence).

⁴⁸⁶ See 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 601[04], at 601-29.

⁴⁸⁷ See FED. R. EVID. 401; *supra* text and notes at notes 103-17.

⁴⁸⁸ See FED. R. EVID. 403.

⁴⁸⁹ See *supra* text and notes at notes 118-31.

⁴⁹⁰ 616 F.2d 181 (5th Cir. 1980).

her husband, the defendant.⁴⁹¹ The Fifth Circuit reversed, saying that "the defense [proponent] should have been afforded an opportunity to make a proffer and a record to determine the witness' ability to testify."⁴⁹² The court stated in a footnote its doubts as to whether mental incapacity was an exception to the general rule that a witness cannot be disqualified for incompetency,⁴⁹³ so its holding that there was error in failing to permit a proffer was based upon a relevancy analysis. If mental illness constituted incompetency to testify, then under traditional authority the burden on the issue would be allocated to the objector.⁴⁹⁴ Since the decision was reversed because the proponent was unable to make a proffer, the Fifth Circuit thought it was incumbent upon the proponent to establish admissibility. However light the burden under relevancy analysis,⁴⁹⁵ it is still imposed upon the proponent.⁴⁹⁶ Thus, to analyze the problem as one of relevancy leads to moving the burden from the opponent, who bore it under traditional incompetency rules, to the proponent. This makes the allocation even more inconsistent with Rule 601's preclusion of incompetency as a bar to testimony.

The policy of liberal admissibility of relevant evidence, which had led to placing the burden upon the party alleging incompetency, is directly implemented by Rule 601's general declaration of competency.⁴⁹⁷ Consistent with that policy, under Rule 601, objections to the ability of a witness to testify on the basis of incompetency are meritless. Where the claimed incompetency is so severe that it leads the court to doubt the relevance of the testimony, it will be the proponent's burden to show relevance.⁴⁹⁸ In less severe cases, in which the testimony is relevant, but there may be countervailing dangers, it will be the opponent's burden to show that the risks of the evidence substantially outweigh its probative value.⁴⁹⁹ So, Rule 601 has transformed the policy question into one of relevance and its counterweights, instead of one relating to artificial categorization of witnesses prohibited from testifying.

It is fairer to assign the burden of proving relevance to the proponent, since he will usually have more information about the witness he proffers than the objector. For this same reason, it will generally be more efficient for the proponent to marshal the facts on the mental state of the proffered witness in response to a relevance objection.

⁴⁹¹ *Id.* at 183. The trial judge indicated that the proffered witness, having been found incompetent to stand trial in the instant case, would be incompetent to stand trial for perjury, and therefore should not be permitted to testify. *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.* at 183 n.1. (citing *United States v. Roach*, 580 F.2d 181, 185-86 (5th Cir. 1979) (footnotes omitted)).

⁴⁹⁴ See *supra* text and notes at notes 476-79.

⁴⁹⁵ See *supra* text and notes at notes 484-86. The *McRary* court noted that, since the defendant himself was relying upon a defense of insanity, the admission of evidence on that issue should be liberal. 616 F.2d at 184.

⁴⁹⁶ See *supra* text and notes at notes 476-79.

⁴⁹⁷ FED. R. EVID. 601.

⁴⁹⁸ See *supra* text and notes at notes 115-17.

⁴⁹⁹ See *supra* text and note at note 131.

Of the three basic criteria for assigning burdens, it is the policy of easy admissibility of relevant evidence which is the most significant. Even though the burden of establishing relevance is upon the proponent, the standard of Rule 401 is an easy one to meet. When the relevance of the evidence as presented by the witness is established, then questions which were formerly ones of competency are now resolved under the rubric of Rule 403, with the burden to show inadmissibility placed upon the opponent. Since the law governing incompetency now is consistent with the general policy of admissibility of relevant evidence, the allocation of the burdens on these preliminary questions implements, rather than impedes the operation of the law.

2. Expert Testimony

The "[p]reliminary questions concerning the qualification of a person to be a witness" mentioned in Rule 104(a), upon which the court is to make a determination, are those which arise under Rule 702, governing expert testimony.⁵⁰⁰ Although Rule 702 does not explicitly allocate the burdens of production and persuasion, there is little doubt⁵⁰¹ that the party who proffers expert testimony must assume the responsibility of demonstrating that the evidence⁵⁰² will assist the trier of fact, and that the witness is qualified as an expert.⁵⁰³

⁵⁰⁰ FED. R. EVID. 702. Although FED. R. EVID. 104(a) is broadly phrased, in federal practice, all of the common law categories of incompetency have been abandoned, unless State law governs the rule of decision. FED. R. EVID. 601 advisory committee note. See *supra* text and notes at notes 483-97.

⁵⁰¹ See *Pierkowskie v. New York Life Ins. Co.*, 147 F.2d 928, 934 (3d Cir. 1945) (that an expert must be fully qualified before being subject to cross-examination on qualifications is "almost rudimentary"); 2 J. WIGMORE *supra* note 1, § 560, at 756 (Chadbourn rev. 1979) (qualification of witness must be shown by the offering party).

⁵⁰² While experts normally testify in the form of opinion, they may also offer other evidence. FED. R. EVID. 702 ("expert . . . may testify . . . in the form of an opinion or otherwise"); see *id.*, advisory committee note.

A problem closely related to the presentation of expert evidence is that raised by the offer of evidence based upon new scientific processes. When novel scientific techniques are offered as the basis for expert evidence, the prevailing rule is that the proponent of the evidence must demonstrate general acceptance of the technique by the scientific community. See *Frye v. United States*, 293 F.2d 1013, 1014 (D.C. Cir. 1923). Although the *Frye* standard has been subject to severe criticism, there remains considerable support for the standard. See Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1228 (1980). See also 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 382, at 644 (*Frye* standard has survived enactment of Rule 702. Evidence not accepted in scientific community, however, might still be helpful to a jury and qualify under Rule 702). But see 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 702[03], at 702-16 (no mention of the *Frye* standard by the drafters in Rule 702 should be considered abandonment of the standard.) The *Frye* standard is a higher one than relevance under Rule 401, or helpfulness under Rule 702. Disputes about the desirability of the standard, however, are directed to the standard of persuasion, not to its allocation.

⁵⁰³ An expert may be qualified "by knowledge, skill, experience, training or education." FED. R. EVID. 702. See *Meder v. Everest & Jennings, Inc.*, 637 F.2d 1182, 1188 (8th Cir. 1981) (expertise in wheelchair accident reconstruction not established by proponent); *United States v. Johnson*, 575 F.2d 1347, 1360-61 (5th Cir. 1978) (expertise of witness established by proponent); *Trick v. Trick*, 587 S.W.2d 771, 773 (Tex. Civ. App. 1979) (party did not meet its burden of establishing expert's qualification); 1 D. LOUISELL & C. MUELLER,

Traditionally, the judge determines these questions.⁵⁰⁴ "[T]he trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous."⁵⁰⁵

Within the discretion granted the trial court, some judges may rely on assumptions as rules of thumb in qualifying experts. For example, some judges may consider any licensed physician to be qualified as a medical expert.⁵⁰⁶ To respond to this sort of assumption, the objecting party may be forced to assume the burden of disproving them. Such assumptions are, in effect, presumptions, since they assist the proponent in satisfying the burdens of persuasion and production.⁵⁰⁷ The permissibility of such assumptions depends upon the breadth of discretion which the court enjoys. This discretion, however, is not unlimited. For example, rules of substantive law, such as those in medical malpractice cases, may require that the witness' expertise relate to a specific geographic area or to a medical specialty.⁵⁰⁸ Such rules, of course, serve to limit the court's reliance on rules of thumb, thus limiting its discretion.

The policy basis for imposing the burden of showing qualification of an expert upon his proponent is found in the opinion rule, which required witnesses to testify to "facts," and not to "opinions."⁵⁰⁹ Expert evidence is frequently⁵¹⁰ in the form of opinion, thus the proponent of expert evidence should carry the onus of demonstrating that the proffer is an exception to the rule generally prohibiting opinion testimony. The analogous principle in traditional

supra note 9, § 35, at 258-59 (proponent bears burden of showing its witness' expertise).

⁵⁰⁴ See *infra* note 505. Analytically, the only reason to relieve the jury of this task is to save time. See Kaplan, *Of Mabrus and Zorgs — An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987, 999 n.19 (1978). Professor Kaplan's point is apparently that expertise is a matter of conditional relevance; if the jury does not believe the witness to be an expert, they will not consider his evidence to be relevant. *Id.*

⁵⁰⁵ *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962), citing *Spring Co. v. Edgar*, 99 U.S. 645, 645 (1878); *United States v. Lopez*, 543 F.2d 1156, 1158 (5th Cir. 1976); 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 702[02], at 702-11 (trial judge has great discretion with regard to admission or exclusion of expert testimony); 2 J. WIGMORE *supra* note 1, § 561, at 756-59 (Chadbourn rev. 1979) (determination of expert's qualification left to the judge).

In *United States v. Winograd*, 656 F.2d 279 (7th Cir. 1981), the Seventh Circuit refused to reverse the trial court's decision to permit a witness to testify as an expert, even though the appellate court agreed that the expert was not adequately qualified. *Id.* at 282. The court relied on (1) the trial court's discretion; (2) the limited nature of the testimony; and (3) the appellant's failure to show that the testimony was incorrect or that it did not assist the jury. *Id.*

⁵⁰⁶ See *Kelly v. Carroll*, 36 Wash. 2d 482, 491, 219 P.2d 79, 85 (1950), *cert. denied*, 340 U.S. 892 (1950) (doctors with unlimited licenses are competent to give expert testimony regarding the entire medical field). See also *Haynes v. County of Missoula*, 163 Mont. 270, 289, 517 P.2d 370, 381 (1973) (fire marshal who has engaged in particular profession, trade or calling for a reasonable time will be assumed to have ordinary knowledge common to persons in that profession). These attitudes vary widely, and are simply a matter of the practice of an individual judge.

⁵⁰⁷ See Cleary, *supra* note 23, at 16-21.

⁵⁰⁸ See 3 D. LOUISELL & C. MUELLER, *supra* note 9, § 381, at 636.

⁵⁰⁹ See generally C. MCCORMICK, *supra* note 4, § 11 (discussion of the evolution of the opinion rule); 7 J. WIGMORE, *supra* note 1, §§ 1917-1922 (Chadbourn rev. 1978).

⁵¹⁰ FED. R. EVID. 702 advisory committee note.

burdens analysis is that the party relying upon an exception should demonstrate its applicability.⁵¹¹ Placing the burdens on the proponent makes it more difficult, at least theoretically, to present expert evidence. That difficulty serves the policy ban of the opinion rule.

The exclusion of opinion evidence is not nearly as rigid under the Federal Rules as it was at its height in common law.⁵¹² Moreover, the Federal Rules express a permissive approach toward the admission of relevant evidence,⁵¹³ and a liberal acceptance of expert evidence.⁵¹⁴ These policies do not alter the allocation decision, but they should influence the application of Rule 702, with its two criteria of qualification of the witness, and helpfulness to the trier of fact. The drafters of the Federal Rules wanted to encourage the use of expert evidence,⁵¹⁵ so if the proponent meets the relatively easy standards of the Rules, the factfinder will have the benefit of specialized information.

"Fairness," defined as readier access to proof on the disputed proposition, is also an important factor. It is highly likely that the party proffering expert testimony will have selected the expert, and prepared the testimony with the expert's cooperation.⁵¹⁶ Accordingly, the party proffering the expert will easily have any data which would support the finding of qualification. It would certainly be inequitable to require the expert's opponent to marshal the proof of lack of expertise or of lack of assistance to the trier of fact. Efficiency is also an important determinant. The proponent already has the information about the expert; as a matter of advocacy, the proponent is likely to be prepared to present the witness to the jury, in order to increase the persuasive effect of his evidence.⁵¹⁷ Qualification of the expert is a logical part of that introduction. It would be illogical for the revelation of the witness' credentials to occur only in the course of a challenge to expertise. It is more efficient for the factfinder on qualification, the judge, to hear information in logical progression.⁵¹⁸ Also, the judge can stop the presentation of credentials as soon as he is satisfied that the proponent has made a satisfactory showing of expertise, and then permit the opponent to challenge qualification, so that the minimum amount of time is

⁵¹¹ See G. FLETCHER, *RETHINKING CRIMINAL LAW*, § 7.2.1, at 520 (1978); C. MCCORMICK, *supra* note 4, § 337, at 787-88; Cleary, *supra* note 23, at 9-10, quoting Stone, *Burden of Proof and the Judicial Process*, 60 L. Q. REV. 262, 280-81 (1944)).

⁵¹² See FED. R. EVID. 701 advisory committee note.

⁵¹³ See 1 D. LOUISELL & C. MUELLER, *supra* note 9, § 111, at 865 (basic tenet that all relevant evidence is admissible).

⁵¹⁴ See 3 J. WEINSTEIN & M. BERGER, *supra* note 41, ¶ 702[02], at 702-14 (Federal Rules emphasize a liberalization of rules on expert testimony).

⁵¹⁵ See FED. R. EVID. 702 advisory committee note.

⁵¹⁶ See Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 414 (1952) (expert called by a party generally expected to represent that party's position). See also T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* § 4.8, at 135-36 (1980).

⁵¹⁷ See T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* §§ 4.8-4.9, at 135-41 (1980).

⁵¹⁸ See C. MCCORMICK, *supra* note 4, § 337, at 787.

consumed. Of course, the expert's qualifications are also relevant to the weight and credibility of his testimony, so that information may be repeated for the jury,⁵¹⁹ if they have not heard it being presented to the judge.⁵²⁰

CONCLUSION

The modern practice of granting the trial judge a good deal of discretion in matters relating to the admission of evidence is wise. This discretion, however, must be subject to some structure, and its exercise should be consistent with the basic principles of the law of evidence. The Federal Rules of Evidence provide the structure. The basic principles developed and illustrated in this article — policy, fairness and efficiency — are offered to guide the use of trial court discretion within that structure. They also provide criteria for appellate courts to evaluate discretionary decisions.

The general policy which underlies the Rules, liberal admissibility of relevant evidence, and specific policies articulated in individual rules, are much clearer than they are in systems in which the law of evidence is not statutory. Although it cannot be said that the policy basis for burden-allocation in preliminary questions is always unambiguous, at least the Rules and their legislative history provide a point of departure in the search for a statement of policy.

Fairness concerns, as has been shown, vary with the facts of each case. The most that can be asked is that fairness be considered when burdens are allocated. Obviously, fairness should not dictate an allocation of burdens which would contravene clear policy. But policy is often not clear. In addition, to minimize unfairness, a trial judge should encourage cooperation between the parties, so that information which bears upon the preliminary fact question will be revealed.⁵²¹

The influence of efficiency should be analogous. Efficiency concerns will also vary in each case. When policy does not clearly mandate a burden-allocation, efficiency should be nearly as important as fairness. Indeed, since the allocation is set in the context of a preliminary matter, often not related to the main issues in the case, it can be argued that efficiency is more important than fairness. Although decisions on preliminary matters often affect the outcome of the case,⁵²² they are not the central issues to be resolved. Their resolution should distract as little attention and as few resources from the central

⁵¹⁹ FED. R. EVID. 104(e).

⁵²⁰ FED. R. EVID. 104(c) advisory committee note.

⁵²¹ In more technical terms, fairness should affect the allocation of the burden of production, even when it cannot change the assignment of the burden of persuasion. The burden of production is relevant in preliminary fact determinations as an incident of the burden of persuasion. *See supra* text and notes at notes 24-26. Normally, the production burden rests on the party who has the persuasion burden. *See supra* note 24. Access to the evidence is a factor, however, which would justify allocating the two burdens differently. *See supra* text and notes at notes 239-48, 341 and 441. *Cf. supra* note 216.

⁵²² *See supra* text and notes at notes 8-9.

dispute as possible. Indeed, minimizing the costs of preliminary dispute resolution is one of the salutary effects of codification, as well as one of its purposes.⁵²³ The presentation of evidence remains, however, an adversary process, and in that process, fairness has always been preferred over efficiency.

When the court allocates the burdens of persuasion and production, it should consider each of these principles. The very process of considering the factors of policy, fairness and efficiency is itself an implementation of them. One of the most basic policies of the Rules of Evidence is that the process of admission be a rational one. It is an essential aspect of fairness that the parties know the reasons for decisions which affect them. Finally, efficiency dictates that the parties know what is expected of them so that they can prepare to meet those expectations.