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### Theorizing Corroboration

Maggie Wittlin

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## THEORIZING CORROBORATION

Maggie Wittlin†

*A child makes an out-of-court statement accusing an adult of abuse. That statement is important proof, but it also presents serious reliability concerns. When deciding whether it is sufficiently reliable to be admitted, should a court consider whether the child's statement is corroborated—whether, for example, there is medical evidence of abuse? More broadly, should courts consider corroboration when deciding whether evidence is reliable enough to be admitted at trial? Judges, rule makers, and scholars have taken significantly divergent approaches to this question and come to different conclusions.*

*This Article argues that there is a key problem with using corroboration to evaluate admissibility. Corroborated evidence is, indeed, more likely to be reliable than uncorroborated evidence. But that does not mean that corroboration is always a proper admissibility consideration. In fact, if the corroboration simply proves the same material fact as the corroborated evidence, using corroboration to determine the admissibility of the evidence can impede rational truth-seeking through a mechanism this Article calls “structural confirmation bias.”*

*What should courts and rule makers do, then, when a category of evidence is critically important but also presents troubling reliability concerns? This Article offers a theoretical framework for thinking about corroboration that can help rule*

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*makers and judges craft and apply corroboration rules. It first argues that when that type of evidence will typically be introduced by the party with the burden of proof, it is better to require corroboration to sustain a verdict than to require corroboration to admit the potentially unreliable evidence. However, when that type of evidence may be introduced by either party, courts should consider only corroboration that does not trigger “structural confirmation bias.”*

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#### INTRODUCTION

We begin with a distressingly common story: A child tells her teacher that an adult abuses her.<sup>1</sup> Later, a judge finds the child unable to testify, and the prosecution seeks to introduce the earlier statement at the adult’s trial. The accusation is

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<sup>1</sup> Cf. *Idaho v. Wright*, 497 U.S. 805, 811 (1990) (describing a statement made to a pediatrician).

hearsay,<sup>2</sup> and the court will exclude it if no exception applies. However, an exception may well apply: Many states have hearsay exceptions specifically allowing for the statements of child victims,<sup>3</sup> and even in jurisdictions that do not, courts may use a residual exception to the hearsay rule to admit the statement.<sup>4</sup> The child's statement is an important piece of evidence—a direct accusation from an alleged victim—but it also raises serious reliability concerns. Did the child lie? Did she miscommunicate? Did another adult influence what she said?<sup>5</sup> And if so, how will a jury know? Some circumstances surrounding the child's statement may give us a clue; if the child made the comment spontaneously, without prompting, for example, that might suggest trustworthiness. But courts and legislatures have sometimes looked at another factor to determine reliability: corroborating evidence. If there is medical evidence of abuse, for example, a court will more likely admit the child's statement.<sup>6</sup>

Should courts consider corroborating evidence when deciding whether to admit hearsay? In 1990, the Supreme Court said “no,” at least in the context of the Confrontation Clause. In *Idaho v. Wright*, Justice O'Connor concluded that a hearsay statement's reliability stems from “its inherent trustworthiness,” and courts could not look to corroborating evidence to determine whether a statement is trustworthy.<sup>7</sup> Justice Kennedy disagreed, noting in dissent that “common sense” dictates that “one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence.”<sup>8</sup> But after the Court's 2004 decision in *Crawford v.*

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<sup>2</sup> See FED. R. EVID. 801(c). Hearsay is an out-of-court statement offered for the truth of the matter asserted in the statement. *Id.* Hearsay is inadmissible unless another Rule (or statute) permits it. Fed. R. Evid. 802.

<sup>3</sup> See, e.g., WASH. REV. CODE § 9A.44.120 (providing for the admissibility of child victims' hearsay statements when certain criteria are satisfied).

<sup>4</sup> See, e.g., FED. R. EVID. 807 (excepting from the rule against hearsay statements not otherwise admissible under Rule 803 or Rule 804 if they satisfy criteria of trustworthiness and necessity).

<sup>5</sup> Young children are, indeed, often more suggestible than adults. Richard D. Friedman & Stephen J. Ceci, *The Child Quasi Witness*, 82 U. CHI. L. REV. 89, 101 (2015) (citing research). However, research also indicates that young children have reasonably good memories and have a less developed ability to lie than adults. *Id.*

<sup>6</sup> See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 802, 802 n.521.

<sup>7</sup> *Idaho v. Wright*, 497 U.S. 805, 822 (1990).

<sup>8</sup> *Id.* at 828 (Kennedy, J., dissenting).

*Washington*,<sup>9</sup> Confrontation Clause analysis no longer looks to indicia of reliability, so *Wright* is no longer binding precedent.<sup>10</sup>

The corroboration question is still very much alive in the hearsay context. Eighteen states have an exception for child statements about abuse that includes a corroboration requirement, if the child is unavailable to testify.<sup>11</sup> Courts interpreting the federal residual exception, Rule 807, have long considered corroborating evidence when evaluating hearsay reliability,<sup>12</sup> and in December 2019, the Rule was amended to explicitly direct courts to consider corroboration when determining whether a “statement is supported by sufficient guarantees of trustworthiness.”<sup>13</sup> The Federal Rules require support from “corroborating circumstances” before a statement against penal interest can be admitted in a criminal case,<sup>14</sup> and the Advisory Committee has approved a proposed amendment to that Rule explicitly directing courts to consider any evidence corroborating the statement.<sup>15</sup> And courts often require some corroboration before they will admit an out-of-court confession into evidence.<sup>16</sup> In addition to these corroboration “admissibility rules,” in which evidence is *admitted* only if it is corroborated, courts also enforce a number of corroboration

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<sup>9</sup> 541 U.S. 36 (2004).

<sup>10</sup> Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 556 (2010) (“[S]ince *Crawford* overruled *Roberts*, there is nothing left of *Wright*.”).

<sup>11</sup> ALA. CODE § 15-25-34; ARIZ. REV. STAT. § 13-1416; CAL. EVID. CODE § 1360; COLO. REV. STAT. § 13-25-129; CONN. CODE EVID. § 8-10; FLA. STAT. § 90.803(23); IDAHO CODE § 19-3024; 735 ILL. COMP. STAT. 5/8-2601; MD. CODE ANN., CRIM. PROC. § 11-304; MINN. STAT. § 595.02(3); MISS. R. EVID. 803(25); N.J. R. EVID. 803(c)(27); N.D. R. EVID. 803(24); OKLA. STAT. tit. 12, § 2803.1; OR. REV. STAT. § 40.460(24); S.D. CODIFIED LAWS § 19-19-806.1; VA. CODE § 19.2-268.3; WASH. REV. CODE § 9A.44.120; *see also* KY. R. EVID. 804A (enacted by the legislature but not adopted by the Kentucky Supreme Court).

<sup>12</sup> *See infra* note 62; Daniel J. Capra, *Expanding (or Just Fixing) the Residual Exception to the Hearsay Rule*, 85 FORDHAM L. REV. 1577, 1584, 1607 (2017).

<sup>13</sup> *See* FED. R. EVID. 807(a)(1); U.S. SUP. CT., CONGRESSIONAL RULES PACKAGE 2019, at 125 (2019), <https://www.uscourts.gov/file/26270/download> [<https://perma.cc/5ZBF-QKYM>].

<sup>14</sup> *See* FED. R. EVID. 804(b)(3)(B).

<sup>15</sup> *See* Memorandum from Hon. Patrick J. Schiltz, Chair, Advisory Comm. on Evidence Rules, to Hon. John D. Bates, Chair, Standing Comm. on Rules of Prac. & Proc. 12–13 (May 15, 2022), <https://www.uscourts.gov/file/43957/download> [<https://perma.cc/4JZU-JV66>].

<sup>16</sup> Comment, *Corroboration of Extrajudicial Statements*, 7 STAN. L. REV. 378, 379–80 (1955); Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall & Amy Vatner, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 486; *but see* United States v. Brown, 617 F.3d 857, 860 (6th Cir. 2010) (“Voluntariness goes to admissibility, while corroboration goes to sufficiency.”).

“sufficiency rules” or “rules of weight,”<sup>17</sup> in which a certain type of uncorroborated evidence—accomplice testimony,<sup>18</sup> or a single witness’s testimony in a prosecution for treason<sup>19</sup>—is deemed an insufficient basis for a conviction.<sup>20</sup>

Scholars have long debated corroboration admissibility rules—whether they further the aims of the Rules of Evidence and the exceptions to the rule against hearsay.<sup>21</sup> Most scholars in favor of considering corroboration have agreed with Justice Kennedy: it is simply common sense that corroboration—especially corroboration of a story’s details—suggests trustworthiness. Proponents also note that courts have long considered corroboration in their reliability analyses. Scholars opposed to considering corroboration agree with Justice O’Connor that a statement is trustworthy for purposes of a hearsay exception only when cross-examination would not be of significant value, and corroboration does not obviate the need for cross-examination—only *circumstantial* guarantees of trustworthiness do. Also, opponents highlight the danger of “bootstrapping” unreliable hearsay evidence onto corroborating evidence, and they note that corroboration rules tie admissibility to the quality of the prosecution’s case. Scholars discussing corroboration often seem to be talking past each other, not really addressing why they disagree.

This Article focuses the corroboration debate. It argues that corroboration is neither a categorically valid nor a categorically invalid way of testing reliability. Rather, the soundness of using corroboration to determine the admissibility of potentially untrustworthy evidence depends on *how* the corroboration tends to prove the trustworthiness of the evidence. Does the corroboration simply prove the same material fact as the evidence is offered to prove, making the evidence more likely to be true and trustworthy? If so, the Article argues, using corroboration to determine the admissibility of the evidence may raise a rational truth-seeking problem, which it calls “structural confirmation bias.” If it corroborates a fact within the statement *other* than the material fact that the evidence is offered to prove, it does not raise the problem.

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<sup>17</sup> See Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957 (2008).

<sup>18</sup> See Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1533, 1533 n.240 (2008).

<sup>19</sup> See U.S. CONST. art. III, § 3.

<sup>20</sup> See Barzun, *supra* note 17, at 1964–65.

<sup>21</sup> See *infra* Part I. C.

To make this point, the Article uses Bayesian reasoning: a method of rationally updating one's beliefs in light of new evidence that has been influential in modeling proof at trial.<sup>22</sup> In essence, the Article recognizes that corroborating evidence often *does* increase the likelihood that the evidence it corroborates is true and trustworthy. However, admitting or excluding evidence based on whether it is corroborated in this way is equivalent to forcing the jury to assign weight to new evidence based on the strength of the proponent's case. That would double-count the evidence in violation of Bayesian updating, because the juror would fail to separate her priors from the weight assigned to new evidence.<sup>23</sup> If, however, the corroboration proves trustworthiness by some other logic—it corroborates a detail in the evidence, for example—it might reasonably serve as the basis for admissibility.

Courts and commentators who unreservedly favor corroboration as an admissibility consideration may fail to realize this, or they may simply be operating under a different understanding of what it means for evidence to be “trustworthy” and thereby worthy of admission. Most courts would probably say that evidence is “trustworthy” when it has some inherent quality that makes it likely to contain accurate information and justifies a factfinder's reliance on it.<sup>24</sup> But others might deem evidence “trustworthy” when the jury has the tools to accurately assess its probative value.<sup>25</sup> Still others might deem evidence “trustworthy” when it is simply likely to be true.<sup>26</sup> Only this last view provides a path to broadly consider corroboration as a factor in admissibility, but that view has problems of its own: it conflates the question of whether evidence is *admissible* with the question of whether the evidence is *sufficient* to support a finding of fact.

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<sup>22</sup> See Reid Hastie, *Introduction* to INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 3, 11 (Reid Hastie ed., 1993) (“[M]any legal scholars [have] . . . propose[d] the application of [Bayes'] theorem as a prescription or description for factfinders' reasoning in legal cases.”). Some evidence scholars challenge or reject Bayesianism and other probabilistic approaches to evidence. See, e.g., Ronald J. Allen & Michael S. Pardo, *Relative Plausibility and Its Critics*, 23 INT'L J. EVIDENCE & PROOF 5, 58 (2019) (criticizing probabilistic explanations for “fail[ing] to accommodate actual human cognitive practices” and “to explain numerous aspects of juridical proof”). But their proposed alternatives can often be framed in Bayesian terms. See Maggie Wittlin, *Common Problems of Plausibility and Probabilism*, 23 INT'L J. EVIDENCE & PROOF 184, 185 (2019).

<sup>23</sup> See *infra* notes 152160 and accompanying text.

<sup>24</sup> See *infra* notes 123–131 And accompanying text.

<sup>25</sup> See *infra* notes 223, 232–233 and accompanying text.

<sup>26</sup> See *infra* notes 224, 255–258 and accompanying text.

The Article argues, then, that if the rule applies to types of evidence where the proponent of the evidence also has the burden of proof,<sup>27</sup> corroboration sufficiency rules—those that require corroboration to sustain a verdict—are preferable to admissibility rules. If it applies to evidence that either party may introduce, admissibility rules, such as the one in the amended Rule 807, are more appropriate. The Article recommends ways that courts can implement corroboration admissibility rules to facilitate rational truth-seeking at trial.

The Article proceeds in three Parts. Part I reviews corroboration admissibility rules, explaining both historical and current corroboration requirements and the scholarly debate these requirements have generated. Part II evaluates corroboration admissibility rules, first under the most intuitive understanding of trustworthiness, then under alternative understandings, showing how corroboration rules present difficulties under each. Part III provides a framework for how corroboration rules *should* work. It explains why and when rules of sufficiency are preferable to rules of admissibility, and it suggests that when courts encounter admissibility rules, they should consider only corroboration that does not trigger “structural confirmation bias.”

## I

### CORROBORATION RULES

#### A. The Rules

A set of federal, state, and common law rules of evidence direct courts to consider whether a certain piece of evidence is corroborated before admitting the evidence. These rules largely apply to various forms of hearsay—out-of-court assertions offered for their truth.<sup>28</sup>

First, several states have a hearsay exception for child statements alleging abuse. Prosecutions for child abuse pose difficult evidentiary and procedural issues.<sup>29</sup> The stakes are high: while we never want to convict an innocent person and rarely wish to acquit a guilty one, it is particularly unpalatable to brand an innocent person a child molester or to free a person who has seriously harmed a child. There may not be physical

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<sup>27</sup> This will most typically apply to types of evidence overwhelmingly introduced by prosecutors in criminal cases, such as child statements of abuse, or confessions, or “jailhouse snitch” testimony.

<sup>28</sup> See FED. R. EVID. 801(a)–(c).

<sup>29</sup> See Christopher B. Mueller, *Meta-Evidence: Do We Need It?*, 25 LOY. L.A. L. REV. 819, 831 (1992).



evidence of assault,<sup>30</sup> the only direct eyewitness may be the abused child, and that child may be incompetent<sup>31</sup> or unwilling<sup>32</sup> to testify. But often the child will have told someone—a parent, a teacher, a doctor—about the alleged abuse. This hearsay evidence could go far toward proving the defendant's guilt, but none of the traditional hearsay exceptions are directly on point.<sup>33</sup>

In light of this landscape, a majority of states have enacted so-called “tender years” hearsay exceptions, which permit hearsay testimony from victims of abuse under a specified age, often 10 or 12.<sup>34</sup> Eighteen of these states include a corroboration requirement in their exception.<sup>35</sup> These statutes largely follow Washington's exception—the earliest such law<sup>36</sup>—in requiring *both* a finding of trustworthiness based on circumstantial evidence *and* corroborative evidence of the sexual or

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<sup>30</sup> See, e.g., *Smith v. State*, 674 So.2d 791, 793 (Fla. Dist. Ct. App. 1996) (“[T]he police were not able to obtain any medical or physical forensic evidence to corroborate the child's testimony.”); *Mendoza v. State*, No. 05-01-01816-CR, 2002 WL 31429766, at \*2 (Tex. Ct. App. Oct. 31, 2002) (noting that there was no medical evidence of abuse, and a pediatrician testified she would not expect to see any).

<sup>31</sup> See, e.g., *State v. C.J.*, 63 P.3d 765, 766-68 (Wash. 2003) (en banc) (child abuse victim unavailable to testify at trial due to incompetency); *In re Lucero L.*, 998 P.2d 1019, 1024 (Cal. 2000) (noting that all counsel stipulated, and the court agreed, that the child was incompetent to testify); *People v. Bowers*, 801 P.2d 511, 514 (Colo. 1990) (child victim who answered basic questions “only with great reluctance and by nodding” deemed incompetent to testify at trial).

<sup>32</sup> See *People v. Rocha*, 547 N.E.2d 1335, 1340 (Ill. App. Ct. 1989) (“A number of State high courts have also found that the inability or hesitance of a child victim of sexual abuse to testify constitutes unavailability.”).

<sup>33</sup> Some courts have used the excited utterance exception, Rule 803(2), or the exception for statements made for medical diagnosis or treatment, Rule 803(4). Robert G. Marks, Note, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 228 (1995). The exceptions are narrow, and courts have had to loosen their requirements to accommodate child statements of abuse. *Id.* The residual hearsay exception, Rule 807, which permits the introduction of trustworthy and necessary hearsay evidence not covered by another exception, is fairly well-suited to allowing reliable statements from children, and it is sometimes used in federal court for that purpose. See, e.g., *United States v. Wandahsega*, 924 F.3d 868, 881-82 (6th Cir. 2019) (holding that the district court did not abuse its discretion in admitting child victim's hearsay statements under the residual hearsay exception). However, it may create an incentive for prosecutors to introduce hearsay evidence where a child could be convinced to give more probative live testimony, and use of the residual exception is somewhat unpredictable, left soundly within the trial court's discretion. See Marks, *supra*, at 235-36.

<sup>34</sup> See Marks, *supra* note 33, at 237.

<sup>35</sup> See *supra* note 11.

<sup>36</sup> Dana D. Anderson, Note, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2128 (1996).

physical abuse, where the child is unavailable to testify.<sup>37</sup> The Washington Supreme Court has said that this corroboration requirement is separate from the reliability assessment and instead aims to protect the defendant from erroneous conviction.<sup>38</sup> However, courts sometimes suggest that the corroboration requirement serves to limit child hearsay to reliable statements.<sup>39</sup>

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<sup>37</sup> WASH. REV. CODE § 9A.44.120. The statute also includes a notice requirement. *Id.* The statute was recently amended to allow for statements made by children under 16 in sex trafficking and commercial sexual abuse cases. See Act of April 19, 2019, ch. 90, 2019 Wash. Sess. Laws 555.

<sup>38</sup> See *State v. Jones*, 772 P.2d 496, 499 (Wash. 1989) (“By permitting into evidence only those hearsay allegations that can be substantiated by other evidence, the corroboration requirement reduces this risk [of erroneous conviction.]”); *State v. C.J.*, 63 P.3d 765, 772 (Wash. 2003) (“Corroboration of the criminal act described by an unavailable child declarant’s hearsay statement may not be used to ‘bootstrap’ the statement for purposes of determining its reliability.”). See also *State v. Renly*, 827 P.2d 1345, 1351 (Or. Ct. App. 1992) (“Corroboration is an additional prerequisite that the legislature included in OEC 803(18a)(b) to ensure that an accused not be convicted solely on the basis of hearsay.”).

<sup>39</sup> See *State v. Bishop*, 816 P.2d 738, 743, 746 (Wash. Ct. App. 1991) (referencing “concern on which the corroboration requirement is based—reliability of the child’s out-of-court statement” and noting that the corroboration in that case “diminishes the likelihood that she fabricated her statement . . . and enhances its reliability”); see also Marks, *supra* note 33, at 241–42 (discussing corroboration as a means “to help ensure that only reliable hearsay is admitted”). Courts have held that the required corroborative evidence need not independently satisfy the prosecutor’s burden of proof beyond a reasonable doubt. Instead, the corroborative evidence must be “evidence of sufficient circumstances which would support a logical and reasonable inference” that the alleged act occurred. *State v. Swan*, 790 P.2d 610, 615 (Wash. 1990) (citing *State v. Hunt*, 741 P.2d 566, 571–72 (Wash. Ct. App. 1987)). Courts have varied in precisely what evidence satisfies the corroboration requirement, but this evidence may include “testimony from . . . [a different] eyewitness . . . ; statements of other children who were present when the act was committed against the victim; medical or scientific evidence indicating that the child was sexually assaulted; expert opinion evidence that the child-victim experienced post-traumatic stress consistent with the perpetration of the offense described by the child; evidence of other similar offenses committed by the defendant; the defendant’s confession to the crime . . . .” *People v. Bowers*, 801 P.2d 511, 525 (Colo. 1990), and other types of evidence, such as unusual sexual knowledge, see Thomas R. Finn, *The Massachusetts Child Hearsay Statute and the Admissibility of Non-Testimonial Out-of-Court Statements Describing Sexual Abuse*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 33, 45 (2011). Eyewitness testimony, medical evidence, and the defendant’s confession are often preferred. See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 802; 5C KARL B. TEGLAND & ELIZABETH A. TURNER, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 807.8 (6th ed. 2016). Some courts have held the corroborating evidence need not be admissible to be considered for purposes of the tender years exceptions, while others have suggested that it must be. Compare *Jones*, 772 P.2d at 498–99 (citing Rule 104(a)), with *Ex parte C.L.Y.*, 928 So.2d 1069, 1073 (Ala. 2005) (noting that corroborative evidence “implicitly must be admissible”).

Only one Federal Rule of Evidence requires some form of corroboration before hearsay may be admitted: the exception for statements against interest, Rule 804(b)(3).<sup>40</sup> This Rule provides, in pertinent part, that a statement from an unavailable declarant may be admitted if it had so great a tendency to expose the declarant to criminal liability that “a reasonable person in the declarant’s position would have made [it] only if the person believed it to be true.”<sup>41</sup> But if the statement is offered in a criminal case, it must be “supported by corroborating circumstances that clearly indicate its trustworthiness.”<sup>42</sup> The advisory committee notes that this requirement addresses a “distrust of evidence of confessions by third persons offered to exculpate the accused,” and specifically a worry that the unavailable declarant fabricated the confession.<sup>43</sup> However, while the requirement initially applied only to statements offered by the defense, it was later expanded to include statements offered by the prosecution, which might also pose dangers of abuse and unreliability.<sup>44</sup> Most courts hold that “corroborating circumstances” in the context of this rule may consist of evidence independently corroborating the substance of the statement.<sup>45</sup> Evidence that the statement was made under circumstances suggesting reliability—such as a lack of motive to lie, or that the statement was made spontaneously—

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<sup>40</sup> Rule 406 specifically provides that evidence of habit may be admitted “regardless of whether it is corroborated.” FED. R. EVID. 406. Interestingly, the advisory committee notes to that Rule say that they rejected a corroboration requirement because it “relates to the sufficiency of the evidence rather than admissibility.” FED. R. EVID. 406 notes of advisory committee on proposed rule.

<sup>41</sup> FED. R. EVID. 804(b)(3)(A). The rule also provides for statements against “proprietary or pecuniary interest” and statements that tend to expose the declarant to civil liability. There is no corroboration requirement for these statements. See FED. R. EVID. 804(b)(3)(B).

<sup>42</sup> FED. R. EVID. 804(b)(3)(B).

<sup>43</sup> FED. R. EVID. 804(b)(3) advisory committee’s note to proposed rule. The notes suggest that fabrication of “the fact of the making of the confession” was also a concern, but credibility of the testifying witness should be left to the jury. See 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:131 (4th ed. 2019); 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 804.06(5)(b)(iii) (Mark S. Brodin ed., 2d ed. 2023).

<sup>44</sup> FED. R. EVID. 804(b)(3) advisory committee’s note to 2010 amendment.

<sup>45</sup> See 5 MUELLER & KIRKPATRICK, *supra* note 43, at § 8:131 nn.25–27. The First, Sixth, and Eighth Circuits do not permit the use of independent evidence corroborating the substance of the statement. Memorandum from Liesa L. Richter to Advisory Committee on Evidence Rules (Oct. 1, 2021), in ADVISORY COMMITTEE ON EVIDENCE RULES 239, 242–43 (2021), <https://www.uscourts.gov/file/35690/download> [<https://perma.cc/2TSM-7XQP>].

also satisfies the requirement.<sup>46</sup> The Advisory Committee has approved a proposed amendment that would explicitly require the consideration of any independent corroborating evidence.<sup>47</sup>

Courts may require corroboration before a defendant's confession may be admitted.<sup>48</sup> The defendant's confession is not excluded by the hearsay prohibition, as it is a statement made by an opposing party.<sup>49</sup> But courts have recognized that confessions pose serious reliability concerns. Confessions may be "coerced or induced," and defendants may struggle to prove that a confession was involuntary.<sup>50</sup> A defendant may also confess falsely.<sup>51</sup> Federal courts and some states,<sup>52</sup> then, require "substantial independent evidence which would tend to establish the trustworthiness of the statement"<sup>53</sup> to either admit a confession or sustain a verdict based on one.<sup>54</sup> However, courts have applied a low bar,<sup>55</sup> and commentators have expressed concern that police may suggest to the suspect known details of a crime, which then both get incorporated into the confession and serve to corroborate the confession.<sup>56</sup>

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<sup>46</sup> See 5 MUELLER & KIRKPATRICK, *supra* note 43, §§ 8:130 n.46, 8:131 nn.28–31; Jennifer L. Mnookin, *Atomism, Holism, and the Judicial Assessment of Evidence*, 60 UCLA L. REV. 1524, 1551 (2013).

<sup>47</sup> See Memorandum, *supra* note 15, at 12–13.

<sup>48</sup> Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1136–37, 1145. The traditional corroboration rule for confessions, developed in the common law, was the "corpus delicti" rule. Richard A. Leo, Peter J. Neufeld, Steven A. Drizin & Andrew E. Taslitz, *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 790 (2013). This rule requires independent evidence that a crime was committed; it does not require evidence that the defendant did it. See *id.* The corpus delicti rule, which originated in England, responded to the risk that an alleged murder victim would make a surprise appearance after his murderer's execution. See Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385, 399 (1993). Today, reliability concerns predominate.

<sup>49</sup> FED. R. EVID. 801(d)(2)(A).

<sup>50</sup> See *Smith v. United States*, 348 U.S. 147, 153 (1954).

<sup>51</sup> *Id.* Indeed, DNA testing has revealed that a substantial number of false convictions—forty-two of the first 252 post-conviction DNA exonerations—involve a false confession. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1052 (2010).

<sup>52</sup> Leo, Neufeld, Drizin & Taslitz, *supra* note 48, at 791.

<sup>53</sup> *Opper v. United States*, 348 U.S. 84, 93 (1954). *Opper* was decided alongside *Smith*.

<sup>54</sup> 11A CYCLOPEDIA OF FEDERAL PROCEDURE § 47:82 (3d ed. 2023).

<sup>55</sup> Leo, Neufeld, Drizin & Taslitz, *supra* note 48, at 791–92.

<sup>56</sup> See, e.g., Ayling, *supra* note 48, at 1186–87 (explaining that in many ways "police are coauthors of the confession"). Although these rules are often styled as sufficiency rules, observers note that they function as admissibility rules. *Id.* at 1136–37.

Like confessions, eyewitness identifications are both convincing and potentially unreliable. In *Manson v. Brathwaite*, the Supreme Court held that testimony concerning even a “suggestive and unnecessary identification procedure does not violate due process” if “the identification possesses sufficient aspects of reliability.”<sup>57</sup> Federal courts of appeals have divided over whether corroborating evidence of the defendant’s guilt may be considered in the reliability determination.<sup>58</sup> As with confessions, commentators have criticized the use of corroborative evidence here, as one central reason for identification error is suggestiveness, and police are likely to suggest identifying a suspect against whom they already have evidence.<sup>59</sup>

The Federal Rules of Evidence contain a residual exception, Rule 807, that permits judges to admit necessary and reliable hearsay that does not fit under any of the enumerated exceptions. A recent amendment to Rule 807, which took effect on December 1, 2019, requires courts to consider whether the hearsay is “supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made *and evidence, if any, corroborating the statement.*”<sup>60</sup> This amendment resolved a circuit split over what evidence courts could consider in determining whether the hearsay has sufficient “circumstantial guarantees of trustworthiness.”<sup>61</sup> Specifically, courts had split over whether they could consider “facts corroborating the veracity of the statement,” in addition to “the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely.”<sup>62</sup> According to the Committee Note, the

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<sup>57</sup> 432 U.S. 98, 106 (1977) (citing *Neil v. Biggers*, 409 U.S. 188 (1972)).

<sup>58</sup> Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1100–01 (2003).

<sup>59</sup> See *id.* at 1126. Sandra Guerra Thompson advocates a corroboration sufficiency rule, in contrast to an admissibility rule, that would require independent, corroborating evidence before a defendant may be convicted on the basis of eyewitness testimony. See Thompson, *supra* note 18, at 1541.

<sup>60</sup> FED. R. EVID. 807(a)(1) (emphasis added). Before the amendment was promulgated, Daniel Capra, Reporter for the Judicial Conference Advisory Committee on the Federal Rules of Evidence, had written that any amendment to Rule 807 should permit consideration of corroborating evidence, as that “is a typical and time-tested means” of evaluating whether a person is telling the truth. See Capra, *supra* note 12, at 1584.

<sup>61</sup> FED. R. EVID. 807 (2011).

<sup>62</sup> *United States v. Bailey*, 581 F.2d 341, 349 (3d Cir. 1978). For cases favoring corroboration, see *id.*; *United States v. Slatten*, 865 F.3d 767, 808 (D.C. Cir. 2017); *Rivers v. United States*, 777 F.3d 1306, 1315 (11th Cir. 2015); *United States v. Hall*, 165 F.3d 1095, 1110–11 (7th Cir. 1999); *United States v. Valdez-Soto*, 31 F.3d 1467, 1471 (9th Cir. 1994). For those rejecting corroboration, see

amended Rule “recognizes that the existence or absence of corroboration is relevant to, but not dispositive of” trustworthiness, and it emphasizes that courts should consider the “strength and quality” of the corroborating evidence.<sup>63</sup> In the new Rule 807, corroboration is not a requirement, as with tender-years hearsay, statements against penal interest, and confessions, but it is a factor to be considered in evaluating trustworthiness.

This Section has not covered every corroboration requirement relating to the admissibility of evidence.<sup>64</sup> But the point

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Huff v. White Motor Corp., 609 F.2d 286, 293 (7th Cir. 1979); United States v. Tome, 61 F.3d 1446, 1452 (10th Cir. 1995). Cf. Robinson v. Shapiro, 646 F.2d 734, 743 n.7 (2d Cir. 1981) (noting the split and suggesting the Second Circuit may permit consideration of corroborating evidence, without resolving the issue). State courts, too, sometimes consider corroborative evidence in the context of their own residual exceptions. See A. Perry Wadsworth, Jr., Note, *Constitutional Admissibility of Hearsay Under the Confrontation Clause: Reliability Requirement for Hearsay Admitted Under a Non-“Firmly Rooted” Exception*—Idaho v. Wright, 14 CAMPBELL L. REV. 347, 356–57 (1992).

<sup>63</sup> FED. R. EVID. 807 advisory committee’s note to 2019 amendment.

<sup>64</sup> The most conspicuous absence is likely the corroboration requirement in Rule 801(d)(2), the hearsay exclusion for statements of a party opponent, including statements by the opponent’s spokesperson, agent or employee, or co-conspirator. The Rule says that while the statement itself is *considered* in evaluating whether the speaker falls into one of these categories, it “does not by itself establish” the required relationship. FED. R. EVID. 801(d)(2). In other words, the Rule requires corroboration. This requirement lies outside the scope of this Article, which examines reliability-related corroboration requirements: rules that require the court to consider corroboration of a statement’s contents as a way of ensuring the statement’s reliability. The corroboration requirement of Rule 801(d)(2) does not primarily perform this function. Instead, it requires corroboration that the statement satisfies the requirements of the Rule itself. The co-conspirator exception is a closer case than the other two: if the statement itself suggests that the declarant and the defendant were co-conspirators, it may, in the exact same way, prove that the defendant committed a crime. However, the central reason for admitting co-conspirator statements is not that they’re unusually reliable; rather, there is a sense that the co-conspirator is the defendant’s agent—that it is fair to attribute his statement to the defendant—and also that the exception is necessary to obtain valuable evidence. See 4 MUELLER & KIRKPATRICK, *supra* note 43, at § 8:58 (“the case for reliability is at best only marginal”). This is not a corroboration rule in the same sense as the others.

In addition, some courts have held that hearsay must be corroborated to be admissible under Rule 803(1)’s “present sense impression” exception. See *People v. Brown*, 610 N.E.2d 369, 374 (N.Y. 1993) (requiring corroboration under the New York exception); Rose Margaret Casey, *Developments in the Law*, 68 ST. JOHN’S L. REV. 283, 285 n.3, 289 n.25, 289–90 (1994) (noting disagreement among courts as to the “amount and type of corroboration, if any, required to assure the reliability of a present sense impression”). Scholars, too, have advocated for a corroboration requirement applied to that psychologically dubious, reliability-based exception. See Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 337–38 (2012); but see Liesa L. Richter, *Don’t Just Do Something!: E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657, 1661

is made: the law contains multiple corroboration admissibility requirements. Is it sensible to use corroboration to prove reliability for purposes of determining admissibility? The next Section discusses the Supreme Court's complicated and somewhat contradictory statements on the issue.

### B. The Supreme Court

The Supreme Court directly addressed whether corroboration proves reliability over thirty years ago in *Idaho v. Wright*.<sup>65</sup> In that case, the trial court had permitted a pediatrician to testify about statements the two-year-old victim made to him concerning her step-father's alleged sexual abuse of her and her sister.<sup>66</sup> The court found the child incapable of testifying, and it admitted the statements under Idaho's residual exception to the hearsay rule.<sup>67</sup> The child's mother, convicted for her participation in the abuse, argued that the admission of the child's statements violated her rights under the Confrontation Clause. The Court used the Confrontation Clause standard set out in *Ohio v. Roberts*,<sup>68</sup> which, for statements that did not fall under a traditional hearsay exception, required the proponent to demonstrate "particularized guarantees of trustworthiness."<sup>69</sup>

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(2012) (arguing against the "percipient witness" requirement proposed by Prof. Bellin). Another commentator proposed that 803(2)'s "excited utterance" exception be replaced with an exception that requires "corroborating circumstances." Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 758 (2015).

Rule 803(3), another hearsay exception, allows courts to admit a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan) . . . but not including a statement of memory or belief to prove the fact remembered or believed . . ." FED. R. EVID. 803(3). This final limitation implies that a statement of the *declarant's* intent can't generally be used to prove what *someone else* did, as that would implicitly rely on a memory of, say, a conversation with the third party, or on a belief about that third party. However, some courts have concluded that a statement of intent to meet with a third person may be introduced to prove that the declarant actually *did* meet with that party, but *only if* corroborating evidence indicates the meeting occurred. See Lynn McLain, "I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker— and the Role of the Due Process Clause, 32 CARDOZO L. REV. 373, 404 (2010); Daniel J. Capra, *Case Law Divergence from the Federal Rules of Evidence*, 197 F.R.D. 531, 549 (2000).

<sup>65</sup> 497 U.S. 805 (1990).

<sup>66</sup> See *id.* at 808–11.

<sup>67</sup> *Id.* at 809–12.

<sup>68</sup> 448 U.S. 56, 65–66 (1980).

<sup>69</sup> *Wright*, 497 U.S. at 816 (quoting *Roberts*, 448 U.S. at 66). *Roberts* required that the statement be both necessary and reliable. In *Wright*, the Court assumed that because the child could not testify, the evidence was necessary. *Roberts* held that if a statement fell within a "firmly rooted" hearsay exception, it was sufficiently reliable. *Roberts*, 448 U.S. at 66.

The central question in *Wright* was whether the court could consider evidence corroborating the child's statement,<sup>70</sup> in addition to the circumstances surrounding the making of the statement, to evaluate its trustworthiness. The Court concluded that it could not. Justice O'Connor, writing for the majority, reasoned that exceptions to the hearsay rule allow only statements for which "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility."<sup>71</sup> Those surrounding circumstances include "spontaneity," "use of terminology unexpected of a child of similar age," "lack of motive to fabricate," and other factors that go to the statement's "inherent trustworthiness."<sup>72</sup> But they do not include separate, corroborative evidence, which "would be no substitute for cross-examination of the declarant at trial."<sup>73</sup>

Justice O'Connor articulated two concerns about using corroborating evidence. First, she worried that unreliable hearsay could be admitted by "bootstrapping on the trustworthiness" of admissible evidence, which would not make the hearsay so trustworthy that cross-examination would be of little use.<sup>74</sup> Second, she worried that partial corroboration—corroboration of the abuse but not the identity of the perpetrator—could mistakenly suggest to a jury that the entire statement is trustworthy.<sup>75</sup> Justice O'Connor wrote that the proper place for corroborative evidence is harmless error analysis.<sup>76</sup>

Justice Kennedy, in a dissent for four justices, disagreed: "It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence."<sup>77</sup> He noted, first, that if a child mentioned some detail—that the defendant tied her wrists, or he had a certain scar—and that detail was confirmed, surely that would indicate trustworthiness.<sup>78</sup> Second, if the child's statement contained inaccuracies, that would suggest that it is *untrustworthy*, so the inverse

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<sup>70</sup> The corroborating evidence included physical evidence of abuse, evidence that the daughter was in her stepfather's custody around the time of injury, and corroborating testimony of the declarant's sister. See *Wright*, 497 U.S. at 834 (Kennedy, J., dissenting).

<sup>71</sup> *Id.* at 820.

<sup>72</sup> *Id.* at 821–22.

<sup>73</sup> *Id.* at 823.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 824.

<sup>76</sup> *Id.* at 823.

<sup>77</sup> *Id.* at 828 (Kennedy, J., dissenting).

<sup>78</sup> See *id.* at 828–29.



should be true as well.<sup>79</sup> He also noted that many courts already consider corroboration to evaluate the reliability of residual hearsay, particularly child hearsay.<sup>80</sup>

Justice Kennedy also noted that the Supreme Court's own precedents had looked to corroboration as an indicator of reliability.<sup>81</sup> Indeed, in additional previous cases, the court had said corroboration helped assure that a third-party confession<sup>82</sup> and hypnotically refreshed testimony<sup>83</sup> were reliable. It had suggested that corroboration could help a *jury* evaluate testimony.<sup>84</sup> And it had indicated that corroborated evidence can be more probative than uncorroborated evidence.<sup>85</sup> The Court has not been entirely consistent, then, in its view of corroboration.<sup>86</sup>

*Wright* no longer strictly binds lower courts, as the Supreme Court's current Confrontation Clause analysis does not turn on reliability.<sup>87</sup> But it retains some power as the Court's clearest statement on the value of corroborating evidence for testing trustworthiness. And the majority and dissent set out some of the key arguments, also picked up by scholars, both for and against using corroboration to test reliability.

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<sup>79</sup> *Id.* at 829.

<sup>80</sup> *Id.* at 831.

<sup>81</sup> *See id.* at 831–33 (citing *Lee v. Illinois*, 476 U.S. 530 (1986); *Cruz v. New York*, 481 U.S. 186 (1987); *Alabama v. White*, 496 U.S. 325 (1990); and others). He further questioned the majority's distinction between circumstances indicating "inherent trustworthiness" and other evidence, noting that, for example, a court would need additional information to determine whether a child's vocabulary indicated abuse, or whether she learned the words elsewhere. *Id.* at 833.

<sup>82</sup> *See Chambers v. Mississippi*, 410 U.S. 284, 300 (1973) (holding that due process required the admission of the corroborated third-party confession).

<sup>83</sup> *See Rock v. Arkansas*, 483 U.S. 44, 56–57 (1987) (holding that a state rule prohibiting hypnotically refreshed testimony, whether or not it bore indicia of reliability, infringed the defendant's right to testify on her own behalf).

<sup>84</sup> *Id.* at 61.

<sup>85</sup> *Bourjaily v. United States*, 483 U.S. 171, 180 (1987) (holding that the content of a co-conspirator's statement could be considered, along with other evidence, in determining whether the statement fit the co-conspirator exception to the hearsay rule, as would later be codified in Rule 801(d)(2)). Interestingly, *Bourjaily* was decided the day after *Rock*, but the author of *Bourjaily*, Chief Justice Rehnquist, dissented in *Rock*, and the author of *Rock*, Justice Blackmun, dissented in *Bourjaily*.

<sup>86</sup> Some earlier decisions, such as *Lee v. Illinois*, 476 U.S. 530 (1986), had declined to rely on corroboration. In that case, the defendant's confession partially corroborated his codefendant's confession, which the judge relied on at trial. The Court held this "interlocking" was not a proper consideration, as the main danger in considering the statement was "selective reliability." *Id.* at 545. Later, in *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Court held unconstitutional a rule that excluded a criminal defendant's evidence of third-party guilt where the prosecution's evidence, if credited, was sufficiently strong. *Id.* at 330.

<sup>87</sup> *See Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

Our neighbors to the north have gone a different way on the corroboration question. In *R. v. Khelawon*,<sup>88</sup> the Canadian Supreme Court reversed prior precedent<sup>89</sup> that held courts could not consider corroborative evidence when determining if hearsay is trustworthy and therefore admissible.<sup>90</sup> Writing for the majority, Justice Charron largely embraced Justice Kennedy's reasoning in *Wright*.<sup>91</sup> She further rejected Justice O'Connor's "bootstrapping" argument, recognizing that this expression typically refers to evidence pulling itself up by its own bootstraps—supporting its own admissibility—as opposed to receiving support from other, unreliable evidence.<sup>92</sup> In a later decision, *R. v. Bradshaw*,<sup>93</sup> the court limited the use of corroboration in determining reliability. It held that to aid in the reliability inquiry, corroborative evidence must itself be trustworthy,<sup>94</sup> must go to the "material aspects of the hearsay statement,"<sup>95</sup> and must overcome the "specific hearsay dangers" posed by the statement<sup>96</sup> to show "that the only likely explanation for the hearsay statement" is that its material aspects are true.<sup>97</sup>

The close decision in the U.S. Supreme Court, followed by a contrary decision in the Canadian Supreme Court, suggests a difficult question and portends scholarly disagreement. Indeed, scholars have long debated whether corroboration is an appropriate reliability consideration.

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<sup>88</sup> [2006] 2 S.C.R. 787 (Can.). In that case, the court considered whether the deceased victim's videotaped statement, accusing the defendant of beating him in a retirement home, could be admitted at trial.

<sup>89</sup> *R. v. Starr*, [2000] 2 S.C.R. 144 (Can.).

<sup>90</sup> Under Canada's "principled approach" to hearsay evidence, a court may consider a hearsay statement that does not fall under a traditional exception if its proponent establishes both necessity and reliability. *Khelawon*, 2 S.C.R. at 812. A party can satisfy the reliability requirement in either of two ways: by demonstrating that the statement is inherently trustworthy, or by showing that the statement's accuracy can be tested and assessed even in the absence of cross-examination. *Id.* at 815. The Court distinguishes between "threshold reliability," for purposes of admitting the evidence, and "ultimate reliability," for purposes of the jury's evaluation. *Id.* at 816–17. *Starr* had held that corroboration might be a useful consideration in determining *ultimate* reliability but was not an appropriate consideration for *threshold* reliability. *Id.* at 817.

<sup>91</sup> *Id.* at 840.

<sup>92</sup> *Id.* at 840–41 (citing and quoting David M Paciocco, *The Hearsay Exceptions: A Game of "Rock, Paper, Scissors,"* 17 Special Lectures of the L. Soc'y of Upper Can. 2003, 29, 36 (2004)).

<sup>93</sup> [2017] 1 S.C.R. 865 (Can.).

<sup>94</sup> *Id.* at 890.

<sup>95</sup> *Id.* at 887.

<sup>96</sup> *Id.* at 892.

<sup>97</sup> *Id.* at 873, 887, 892.

### C. The Scholarly Debate

Scholars have debated the corroboration<sup>98</sup> question for decades. While they have often considered the question with regard to only a single type of hearsay or other type of unreliable evidence,<sup>99</sup> or mentioned a corroboration position as one implication of a larger theory, over time, a robust discussion has developed.

The scholarly arguments *for* using corroboration as a reliability consideration tend to focus on the likelihood that the hearsay statement is true, with the ultimate goal of increasing the probability of an accurate result.<sup>100</sup> A number of commentators have agreed with Justice Kennedy's point that it is simply common sense, or "obvious," that corroboration suggests truthfulness and therefore trustworthiness.<sup>101</sup> "[T]he likeli-

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<sup>98</sup> When I refer to "corroboration," I refer to the kind of evidence that Justice O'Connor's opinion disallows for purposes of reliability analysis: "extrinsic" corroboration that tends to prove part or all of the contents of the statement. This includes both evidence that is otherwise admissible at trial and inadmissible evidence used only at an admissibility hearing. And it includes both evidence that independently proves guilt and evidence that corroborates details in the declarant's statement—like a scar on the defendant's body—that are not independently probative of guilt. I exclude from the definition evidence that goes only to the circumstances under which the statement was made and does not tend to confirm its contents, such as lack of motive to lie, spontaneity, and an opportunity to clearly observe key events: those are "circumstantial guarantees of trustworthiness."

<sup>99</sup> Several of these scholars discuss admissibility rules for non-hearsay types of unreliable evidence. I will continue to label the potentially-unreliable evidence "hearsay," and cite the authors as their arguments apply.

<sup>100</sup> See Capra, *supra* note 12, at 1584 ("The ultimate inquiry is whether the declarant is telling the truth, and reference to corroborating evidence is a typical and time-tested means of helping to establish that a person is telling the truth."); Cynthia J. Hennings, Comment, Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Offense Prosecutions, 16 Ohio N.U. L. Rev. 663, 686 (1989).

<sup>101</sup> See, e.g., John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873, 930 (1994) (approvingly citing 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 472, at 929 (1980), saying corroborative evidence "tends obviously to confirm the trustworthiness of the statement"); Anderson, *supra* note 36, at 2130 (criticizing *Wright* as well); Suhail Akhtar, *Hearsay: The Denial of Confirmation*, 26 Crim. Rep. (6th) 46 (2005) (Can.) ("The 'common sense' approach is difficult to deny."); Laurie Lacelle, *The Role of Corroborating Evidence in Assessing the Reliability of Hearsay Statements for Substantive Purposes*, 19 Crim. Rep. (5th) 376, 387 (1999) (Can.) ("Why such an obvious and accepted method of determining truthfulness should be excluded from the threshold inquiry into reliability is woefully unclear."); Nancy Schleifer, *Might Versus Fright: The Confrontation Clause and the Search for "Truth" in the Child Abuse Family Court Case*, 16 NOVA L. REV. 783, 794 (1992) (suggesting a sexually-transmitted infection would shed light on reliability of a child's abuse accusation); Wadsworth, *supra* note 62, at 364 (describing the additional requirement of corroboration in the tender years exceptions as giving it "a justifiable supporting role"); Laura Barker, Note, *Idaho v. Wright: Who Can Speak for the*

hood of [hearsay's] accuracy increases in direct proportion with the amount of corroborating evidence," they note, so "as a matter of inductive logic, the *Wright* dissent is right."<sup>102</sup> Others have specified that corroboration of *particular details* in the hearsay statement, such as a scar on the defendant's body, tends to increase the likelihood that the statement is reliable.<sup>103</sup> Further, as Charles Nesson and Yochai Benkler note,

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*Children Now?*, 24 AKRON L. REV. 433, 445 (1990) ("[T]he Court [in *Wright*] has rejected a common sense approach to aid in determining the reliability of the proffered testimony and has thereby hindered the search for the truth.").

<sup>102</sup> Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 940, 940 n.145 (1992). Seigel does not take a position on the Confrontation Clause question in *Wright*; instead, he analyzes the sufficiency of hearsay. See also 5 MUELLER & KIRKPATRICK, *supra* note 43, § 8:144 (asserting corroboration "logically tend[s] to bolster the credibility of hearsay statements"); George Fisher, *The Crawford Debacle*, 113 MICH. L. REV. FIRST IMPRESSIONS 17, 30–31 (2014) ("[T]here appears no sound reason to disregard corroborative evidence when judging reliability."); John E.B. Myers, Ingrid Cordon, Simona Ghetti & Gail S. Goodman, *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 L. & CONTEMP. PROBS. 3, 43 (2002) (writing that *Wright* "requires judges to close their eyes to evidence that can be highly probative of reliability"). Some have also noted that while the presence of corroborating evidence tends to prove reliability, the *absence* of corroborating evidence, where we would expect to see it, can suggest untrustworthiness. See FED. R. EVID. 807 advisory committee's note to 2019 amendment ("the existence or absence of corroboration is relevant to" admissibility) (emphasis added); Capra, *supra* note 12, at 1585; John Claiborne Koski, Case Comment, *Idaho v. Wright: The Defenestration of Corroborating Evidence*, 46 U. MIAMI L. REV. 205, 233 (1991) ("[A] lack of corroborating evidence . . . should be a factor in the larger calculus of the statement's trustworthiness."); cf. Haleh Akhlaghi, Note, *Idaho v. Wright: The Confrontation Clause Guarantees in Child Sexual Abuse Cases*, 13 WHITTIER L. REV. 489, 511 (1992) (noting that "a lack of corroborating evidence can be used to impeach a witness's hearsay testimony"). And some have noted the long history of using corroboration for this purpose. See Capra, *supra* note 12, at 1607 ("The cases show that most courts do rely on corroboration . . ."); Joseph W. Rand, Note, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt To Restrain Judicial Discretion*, 80 GEO. L.J. 873, 898 (1992) ("Courts today look at corroboration as one of many factors . . .").

<sup>103</sup> See Christopher B. Mueller, *Tales Out of School—Spillover Confessions and Against-Interest Statements Naming Others*, 55 U. MIAMI L. REV. 929, 949 (2001) ("Among the first things anyone would want to know in appraising trustworthiness is whether the statement is correct on important particulars."); D. Craig Lewis, *Corroborated Hearsay and the Confrontation Clause*, 15 AM. J. TRIAL ADVOC. 293, 330 (1991) (stating corroboration may compensate for lack of cross-examination "when the corroborated facts are sufficiently singular to make coincidence an improbable explanation for the consistency," and the hearsay is independent of the corroboration); McLain, *supra* note 64, at 420 n.253; Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 533 (1998); cf. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 132 n.192 (1997) ("If the suspect tells the police where they can find the murdered victim's body, and the police locate the victim's body at that location, the suspect's admission is clearly trustworthy."); see also Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*,

by allowing cross-examination of the *corroborating* evidence, corroboration replicates the testing process.<sup>104</sup>

The scholars who discuss why corroboration might have a place in the admissibility inquiry have also sometimes noted limitations on the circumstances under which corroborating evidence may helpfully determine reliability. Specifically, Craig Lewis's thoughtful discussion of corroboration notes that corroboration must be *independent* of the hearsay evidence in order to carry any corroborative weight.<sup>105</sup> He has also said that the corroborating evidence itself must be of "unambiguous veracity"<sup>106</sup> in order to support the hearsay evidence. Richard Friedman suggests that to prevent a shadow trial on the merits before hearsay may be admitted, courts might refuse to consider corroborative evidence that merely "points in the same direction as the statement" without giving information "about the making of the statement."<sup>107</sup>

Other scholars have opposed the use of corroboration, often tracking Justice O'Connor's arguments. These scholars tend to focus on the extent to which hearsay replicates the procedural benefits of cross-examination, rather than the extent to which it increases the probability of an accurate result.<sup>108</sup> Corroboration does not satisfy this function because it

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98 HARV. L. REV. 806, 822 (1985) (reasoning that cross-examination tests whether testimony is consistent with other evidence, and corroboration, too, serves that function).

<sup>104</sup> Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149, 164 (1995); see also Bellin, *supra* note 64, at 370–71 (noting that a requirement that a percipient witness communicate a present sent impression at trial can be justified on the grounds that the "combination of a witness who can be cross-examined . . . and the contemporaneity requirement suffice to . . . pass over the hearsay bar").

<sup>105</sup> See Lewis, *supra* note 103, at 330 (noting corroboration may show reliability "when the declarant's knowledge is clearly independent of other potential sources of the information"); see also Koch, *supra* note 58, at 1126–27 (explaining that if police suggest an identification to an eyewitness, and that suggestion stems from evidence they have against the suspect, the corroboration fails to address the central reliability concern of the eyewitness identification).

<sup>106</sup> See Lewis, *supra* note 103, at 330.

<sup>107</sup> Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022 (1998).

<sup>108</sup> See Koch, *supra* note 58, at 1124 (noting, in the context of the Supreme Court's identification testimony case law, "[r]eliability' clearly refers to the reliability of the identification testimony itself, and not to the reliability of the overall outcome—an obvious, yet important distinction"); see also Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 67 n.6 (2008) (noting that Justice O'Connor's opinion in *Wright* "made it clear that what matters here is not the statement's probability of being true, but rather the defendant's opportunity to uncover its flaws and falsities by cross-examining the person who made it"); Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and*

does not provide information about the declarant's testimonial capacities<sup>109</sup>—the declarant's ability to perceive, remember, and describe the events in question accurately, and her commitment to do so sincerely.<sup>110</sup> Instead, only information about the circumstances under which the statement was made, and the person who made it, allow a jury to properly weigh and consider the evidence.<sup>111</sup>

Scholars have also agreed with Justice O'Connor that it is wrong to "bootstrap" hearsay evidence onto other evidence.<sup>112</sup>

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*Limits of Textualism*, 48 WASH. & LEE L. REV. 1323, 1372 n.265 (1991) ("It seems a matter of common sense, in my view, to note that the question whether a speaker is generally or intrinsically trustworthy is quite different and separate from the question whether a particular statement by such a speaker is true.").

<sup>109</sup> See Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1425 (1987) (arguing the corroboration test "does not address the trier's need for foundation facts to use general knowledge and experience to evaluate specific statements made by specific declarants"); Gary M. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 MARQ. L. REV. 1, 34 (1991) ("Corroborating evidence in no way allows the judge to determine whether the hypnosis affected the subject's experiential recall."); Hamish Stewart, *Khelawon: The Principled Approach to Hearsay Revisited*, 12 CAN. CRIM. L. REV. 95, 107 (2007) ("Corroborating or conflicting evidence, while it may be of great importance to the trier of fact in deciding whether to believe the witness at the end of the case, has little or nothing to do with the declarant as an out-of-court witness.").

<sup>110</sup> See Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974).

<sup>111</sup> See Wildenthal, *supra* note 108, at 1373–74; see also Shaw, *supra* note 109, at 33 (arguing that "[b]ecause the likelihood of suggestion or confabulation has not been reduced or eliminated, corroboration does not increase the trustworthiness of hypnotically enhanced recall at all"); Randolph N. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551, 588–89 (1996) (arguing that the text of the (pre-amendment) residual exception requires courts to look only at "the circumstances reducing the hearsay dangers at the time the declaration was uttered," not corroboration, when evaluating trustworthiness); Capt. John L. Ross, *Confrontation and Residual Hearsay: A Critical Examination, and a Proposal for Military Courts*, 118 MIL. L. REV. 31, 72 (1987) (arguing that because the hearsay exceptions "depend for their assumed reliability on the circumstances at the time the declaration was made," the military residual exception should be interpreted that way as well); Jules Epstein, *Avoiding Trial by Rumor: Identifying the Due Process Threshold for Hearsay Evidence After the Demise of the Ohio v. Roberts "Reliability" Standard*, 77 UMKC L. REV. 119, 151–52 (2008) ("[T]he command that there be no trial by rumor necessitates a standard of admissibility that relies on the *intrinsic* quality of the hearsay declaration. To hold otherwise would endorse rumor, as long as extrinsic evidence *seemingly* corroborated it."); Carol A. Chase, *Confronting Supreme Confusion: Balancing Defendants' Confrontation Clause Rights Against the Need to Protect Child Abuse Victims*, 1993 UTAH L. REV. 407, 413 ("Content-based or circumstance-based evaluation of a statement's trustworthiness is superior to reliance upon other evidence that corroborates the accuracy of the statement . . ."); Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 804 ("Corroboration is no substitute for reliability. . .").

<sup>112</sup> See White, *supra* note 103, at 132 n.192 (citing *Wright* approvingly); see also Wildenthal, *supra* note 108, at 1372–73, 1372 n.266 (arguing that Justice

Some suggest “bootstrapping” is impermissible because the corroborative evidence itself might not be reliable, or the jury might choose not to credit it.<sup>113</sup> Gary Shaw, Rudolf Koch, and Mike Redmayne each note a more pointed problem with “bootstrapping,” which I return to later: Using existing evidence to admit hearsay double-counts the corroborative evidence. It is used both for its independent probative value and as the hook that brings in the hearsay evidence, giving it more probative weight than it can bear.<sup>114</sup> Others have more generally expressed discomfort with basing an admissibility decision on the quality of the proffering party’s case, or on the judge’s view of the defendant’s guilt.<sup>115</sup>

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Kennedy’s dissent “never came to grips with the Court’s antibootstrapping logic”); Swift, *supra* note 109, at 1424 (“[T]he effects of corroboration on the trier’s evaluation can be decided only after all the evidence is in, with hindsight.”).

<sup>113</sup> See Epstein, *supra* note 111, at 151; see also David A. Sonenshein & Ben Fabens-Lassen, *Has the Residual Exception Swallowed the Hearsay Rule?*, 64 U. KAN. L. REV. 715, 730 (2016) (characterizing the problem as “admitting hearsay evidence based on previously admitted hearsay”).

<sup>114</sup> See Shaw, *supra* note 109, at 34–35 (“[T]he corroborating evidence is effectively put before the jury twice—once when it is independently introduced into evidence and a second time when the hypnotically enhanced recall is deemed admissible because of the corroborating evidence.”); Koch, *supra* note 58, at 1134 (“[T]hat evidence would essentially be counted twice—first toward general guilt, then again toward admitting the identification, which would, in turn, act as further evidence of guilt. This evidence would therefore be weighted too heavily, to the point that outcomes could become distorted.”); Mike Redmayne, *A Corroboration Approach to Recovered Memories of Sexual Abuse: A Note of Caution*, 116 LAW Q. REV. 147, 152 (2000). Ronald Allen has recognized a similar problem with permissive inference jury instructions that are given only if certain evidence, unmentioned in the instructions, is admitted. See Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 365 (1980). David Godden has argued, in response to Redmayne, that this double-counting is not a problem and jibes with inference to the best explanation. See David Godden, *Corroborative Evidence*, in DIALECTICS, DIALOGUE AND ARGUMENTATION: AN EXAMINATION OF DOUGLAS WALTON’S THEORIES OF REASONING AND ARGUMENT 201, 209 (Chris Reed & Christopher W. Tindale eds., 2010). Douglas Walton and Chris Reed have acknowledged that it can be a problem but have also suggested circumstances where corroboration can have a dual function without raising the double-counting issue. See generally Douglas Walton & Chris Reed, *Evaluating Corroborative Evidence*, 22 ARGUMENTATION 531 (2008); Douglas Walton, *Argument Visualization Tools for Corroborative Evidence*, 17 EVIDENCE SCI. 433 (2009).

<sup>115</sup> See Friedman, *supra* note 107, at 1021–22 (“[A]n argument that the court has examined all the evidence and determined that the defendant is guilty, and therefore he has no confrontation right, is at the least extremely unattractive. . . . The reliability determination threatens to become a shadow of the trial on the merits . . . .”); Roger C. Park, *Hearsay, Dead or Alive?*, 40 ARIZ. L. REV. 647, 652 (1998) (“Extension of this line of cases threatened for a time to allow all grand jury testimony to come in so long as the other evidence against the defendant was good.”); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: an Analysis and a Proposal*, 79 KY. L.J. 259, 308 (1990) (“A corroboration requirement also would foster the confusion

Some scholars have taken positions outside of the pro-corroboration/anti-corroboration dichotomy, suggesting, for example, that corroboration may be considered only under certain conditions.<sup>116</sup>

Scholars on all sides of this debate make reasonable arguments. A chief purpose of evidence law is to achieve accurate results, so if corroboration increases the likelihood that the statement is true, it is a sensible consideration. It also partially substitutes for cross-examination by testing the evidence. On the other hand, it doesn't help the jury evaluate the evidence *in the same way* cross-examination does, nor does it target whether the statement was made under conditions that ensure reliability. And there seems to be something fishy about allowing potentially unreliable evidence to ride on the coattails of other evidence, although there is some disagreement and confusion about exactly what that problem is. The next Part homes in on that last point, pinpointing exactly what is fishy about corroboration rules.

## II

### WHAT'S WRONG (AND RIGHT) WITH CORROBORATION

Do corroboration rules further the goals of the law of evidence? That depends on what those goals are. Courts and commentators have long justified the rule against hearsay—the

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already experienced by some courts between the constitutional standard of reliability and the courts' own evaluation of the probable guilt of the defendant."). At the extreme, this merges the admissibility determination with a determination of guilt or harmless error. See Rosenberg, *supra*, at 308; Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. L. REV. 925, 942 (1992) ("[I]njecting corroboration into the trustworthiness analysis effectively merges harmless error doctrine with evidence law.").

Some scholars have raised an additional argument with regard to the residual exception, specifically, arguing that considering corroboration puts the "trustworthiness" requirement in tension with the "necessity" requirement. If there is sufficient evidence to corroborate the statement, the statement likely isn't "more probative . . . than any other evidence" reasonably obtainable, as required by the second prong of Rule 807(a). See David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 879–80, 888 (1982); Jonakait, *supra* note 111, at 587–88; cf. Shaw, *supra* note 109, at 56 n.287 (writing on non-hearsay hypnotically enhanced testimony: "If the corroborating evidence is sufficiently strong to convict the defendant, then the identification is not truly necessary and should still be inadmissible inasmuch as it is unreliable."). In response, Capra has noted that the hearsay may well be *more* probative than the corroborating evidence, and what's more, the combination of the hearsay and the corroboration might be greater than the sum of its parts; in other words, the hearsay may *gain* value in light of the corroborative evidence. See Capra, *supra* note 12, at 1584–85.

<sup>116</sup> See, e.g., *supra* notes 105–107 and accompanying text.



focus of many corroboration rules—as promoting accuracy.<sup>117</sup> We exclude hearsay “to assist the fact finder (in the classic case, the jury) in ascertaining an accurate picture of historical truth.”<sup>118</sup> Hearsay has not been tested by cross-examination, “the greatest legal engine ever invented for the discovery of truth,”<sup>119</sup> so the jury lacks necessary information about the statement’s flaws and will fail to discount the evidence appropriately.<sup>120</sup> Jurors may overweigh the hearsay and make inaccurate findings of fact. Hearsay, then, should be admitted only when “the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.”<sup>121</sup> Courts should admit hearsay “when it will materially enhance the likelihood of a correct outcome.”<sup>122</sup>

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<sup>117</sup> See *United States v. Boyce*, 742 F.3d 792, 802 (7th Cir. 2014) (Posner, J., concurring) (asserting that the Rule 807 residual exception should “swallow” most of the enumerated exceptions and “hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome”); 5 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1362 (James H. Chadbourn rev., 1974) (“The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination.”); Seigel, *supra* note 102, at 898 (“Most scholars agree that the primary purpose of the rule against hearsay, like most other rules of evidence, is to assist the fact finder (in the classic case, the jury) in ascertaining an accurate picture of historical truth.”); Justin Sevier, *Popularizing Hearsay*, 104 *GEO. L.J.* 643, 647 (2016) (“The primary rationale put forth by scholars and rule makers is that the rule prohibiting hearsay evidence promotes decisional accuracy by barring unreliable evidence from the courtroom.”); Wildenthal, *supra* note 108, at 1373 n.267 (“The very premise of the entire system of rules limiting the admissibility of evidence such as hearsay . . . is the fear that, despite the undoubted marginal probative value of all such evidence, the jury simply cannot be trusted to properly discount the inherently unreliable or prejudicial nature of such evidence.”). Some enumerated hearsay exceptions permit evidence believed to be reliable. See, e.g., *FED. R. EVID.* 803 (creating exceptions for, among other things, excited utterances, statements made for medical diagnosis or treatment, and business records).

<sup>118</sup> Seigel, *supra* note 102, at 898.

<sup>119</sup> 5 WIGMORE, *supra* note 117, at § 1367.

<sup>120</sup> Wildenthal, *supra* note 108, at 1373 n.267.

<sup>121</sup> 5 WIGMORE, *supra* note 117, at § 1420.

<sup>122</sup> *Boyce*, 742 F.3d at 802 (Posner, J., concurring).

This enterprise of excluding hearsay has been roundly criticized. Empirical studies have demonstrated that at least under some circumstances, laypeople discount hearsay, and they are attuned to some factors, such as the declarant’s age, that may affect hearsay reliability. Justin Sevier, *Testing Tribe’s Triangle: Juries, Hearsay, and Psychological Distance*, 103 *GEO. L.J.* 879, 893–96, 904–22 (2015) (reviewing the literature; conducting an original experiment; and concluding that jurors appropriately discount hearsay). And scholars have observed that even if jurors are bad at evaluating the probative value of hearsay, they would have to be *extremely* bad at it for admission to be more harmful than helpful, and

But what does it mean for a statement to be “trustworthy,” and thereby accuracy-enhancing? The predominant view appears to be that a statement is “trustworthy” if it has what Justice O’Connor referred to as “inherent trustworthiness”:<sup>123</sup> something about the circumstances under which the statement was made make it fundamentally sound and worthy of reliance.<sup>124</sup> This aligns, too, with the notion of “evidentiary reliability” or “trustworthiness” in *Daubert*,<sup>125</sup> which required an inquiry into whether expert scientific testimony is based on “scientifically valid” “reasoning or methodology” that can “properly . . . be applied to the facts in issue.”<sup>126</sup> The idea is that this evidence was produced in a way that tends to create accurate evidence, so jurors can put as much credence in it as they

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there is little reason to believe they are that incompetent. See Richard D. Friedman, *Truth and Its Rivals in The Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545, 555 (1998) [hereinafter Friedman, *Truth and Its Rivals*]; Richard D. Friedman, *Minimizing the Jury Over-Valuation Concern*, 2003 MICH. ST. L. REV. 967, 969 [hereinafter Friedman, *Over-Valuation Concern*]; Louis Kaplow, Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1790 (1980) (“Exclusion requires that the gap [between the jury’s perception of the evidence and its absolute reliability] exceed the value of the evidence, and . . . this condition is fulfilled only if the jury assessment exceeds twice the value of the evidence.”). Still, some studies have indicated limitations in jurors’ ability to evaluate hearsay. See Sevier, *supra*, at 895 (reviewing the literature). For example, in one study, mock jurors who read *transcripts* of a child interview were more likely to find the defendant guilty when the interview was conducted well than when it was conducted poorly, but when they received only *hearsay summaries* of the interview, they were equally likely to convict in the “good interview” and “poor interview” conditions. See Julie A. Buck, Amye R. Warren & John C. Brigham, *When Does Quality Count?: Perceptions of Hearsay Testimony About Child Sexual Abuse Interviews*, 28 LAW & HUM. BEHAV. 599, 616 (2004). And even if the trustworthiness rationale for the rule against hearsay has inadequate empirical support, trustworthiness remains the dominant rationale for admitting some hearsay while excluding the rest. Rule 807, the residual exception, reflects this, requiring that “the statement [be] supported by sufficient guarantees of trustworthiness,” in addition to being “more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” FED. R. EVID. 807(a).

<sup>123</sup> *Idaho v. Wright*, 497 U.S. 805, 822 (1990).

<sup>124</sup> See *id.* at 819 (“particularized guarantees of trustworthiness” must be shown by circumstances that “surround the making of the statement and that render the declarant particularly worthy of belief”); 5 WIGMORE, *supra* note 117, at §§ 1420, 1422; G. Michael Fenner, *The Residual Exception to the Hearsay Rule: The Complete Treatment*, 33 CREIGHTON L. REV. 265, 287–88 (2000) (characterizing evidence of trustworthiness as, “evidence that the declarant had the ability to perceive the facts recorded, evidence of the declarant’s inability to have engaged in deception, and the like”); Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 231 (1922) (“If it is to be admitted, it must be because there are some good reasons for not requiring the appearance of the utterer and some circumstance of the utterance which performs the functions of the oath and the cross-examination.”).

<sup>125</sup> *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993).

<sup>126</sup> *Id.* at 592–93, 590 n.9.

would testimony that has survived the test of cross-examination.<sup>127</sup> Canadian courts call this understanding of trustworthiness “substantive reliability.”<sup>128</sup> While there may be slight variations in how “trustworthiness” is understood, even given this basic definition,<sup>129</sup> a key component is that “trustworthiness” is something other than a straightforward probability that the statement is true.<sup>130</sup> I include in this understanding of “inherent trustworthiness” the declarant’s credibility, by which I mean, their propensity, at the time they spoke, to speak truthfully.<sup>131</sup>

This is not the only possible understanding of “trustworthiness,” and indeed, some of the disagreement over the appropriate role of corroboration may stem from differing notions of “trustworthiness.” I will return to that possibility later.<sup>132</sup> For now, I demonstrate the problem with using corroboration to determine inherent trustworthiness for purposes of deciding whether to admit the evidence.

Because there is a problem. It’s just not the one Justice O’Connor thought.

#### A. The Problem

Many scholars and judges have taken the position that corroboration is not valuable because it goes only to the probability that a statement is true and not to its inherent

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<sup>127</sup> See Friedman, *Truth and Its Rivals*, *supra* note 122, at 554 (summarizing the role of “trustworthiness” as a “safe harbor” in a “frequently . . . articulated” argument).

<sup>128</sup> See Chris D.L. Hunt & Micah B. Rankin, *R v Bradshaw: The Principled Approach to Hearsay Revisited*, 22 INT’L J. EVID. & PROOF 68, 76–77 (2018) (“Substantive reliability focuses on the inherent trustworthiness of a statement, and is satisfied where there ‘is no real concern about whether the statement is true or not because of the circumstances in which it came about.’”) (quoting *R. v. Khe-lawon*, [2006] 2 S.C.R. 787, 821 (Can.)).

<sup>129</sup> See, e.g., Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 342 (1961) (noting the tendency of courts to “admit hearsay where there can be no serious doubt of the credibility of the extra-judicial declarant”).

<sup>130</sup> See Shaw, *supra* note 109, at 34 (differentiating between “reliability” and “accuracy” in the context of hypnotically induced recall); Wildenthal, *supra* note 108, at 1372 n. 265 (“It seems a matter of common sense, in my view, to note that the question whether a speaker is generally or intrinsically *trustworthy* is quite different and separate from the question whether a particular statement by such a speaker is *true*.”).

<sup>131</sup> *But see* Julia Simon-Kerr, *Law’s Credibility Problem*, 98 WASH. L. REV. 179 (2023) (discussing multiple understandings of credibility, several of which are not necessarily correlated with truth).

<sup>132</sup> See *infra* Part II.C.

trustworthiness.<sup>133</sup> This was, essentially, Justice O'Connor's position in *Wright*: corroboration might go to harmless error analysis<sup>134</sup>—because the other evidence in the case provides a basis for the jury's finding—but it does not speak to a hearsay statement's "inherent trustworthiness."<sup>135</sup>

But why not? Sure, corroboration is not *direct* proof of inherent trustworthiness. In that sense, it is different from direct proof that the declarant spoke spontaneously or had a strong motive to be truthful. But doesn't it *tend to prove* that the statement was produced under truth-conducive circumstances, since corroborated evidence is more likely to be true, and true evidence is more likely to be produced by a reliable mechanism?<sup>136</sup>

In this Section, I argue that corroboration *does* tend to prove that evidence is reliable, and yet, under an "inherent trustworthiness" theory of reliability, it is irrational to use corroboration *both* to prove a fact at issue *and* as a hook to bring in potentially unreliable evidence.

### 1. *Corroboration and Weight*

To prove this point, I start with a more basic question: Would a rational *factfinder* give corroborated evidence more weight than uncorroborated evidence? I submit the answer is "no." If a rational factfinder is presented with hearsay<sup>137</sup> and corroboration, that factfinder may not use the corroborating evidence *both* to update their belief that the hearsay is reliable *and* to update their beliefs about the fact that the hearsay was introduced to prove. A rational factfinder in *Wright* would *not*

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<sup>133</sup> See, e.g., Shaw, *supra* note 109, at 34 ("Corroborating evidence in no way allows the judge to determine whether the hypnosis affected the subject's experiential recall."); Wildenthal, *supra* note 108, at 1372 n.265 (criticizing Justice Kennedy's dissent in *Wright* on the grounds that corroboration helps determine whether a statement is true, not whether it is trustworthy).

<sup>134</sup> Courts overturn a verdict for an improper evidentiary ruling only if the error affected a party's "substantial rights," meaning it affected the outcome of the trial. FED. R. CIV. P. 61; FED. R. CRIM. P. 52. If a determination is very unlikely to have affected the outcome, it is harmless. *Carson v. Fischer*, 421 F.3d 83, 94 (2d Cir. 2005); *Kotteakos v. United States*, 328 U.S. 750, 757 (1946).

<sup>135</sup> *Idaho v. Wright*, 497 U.S. 805, 822–23 (1990).

<sup>136</sup> Cf. Maggie Wittlin, *Hindsight Evidence*, 116 COLUM. L. REV. 1323 (2016) (discussing how results can tend to prove the events that produced those results).

<sup>137</sup> In anticipation of my application of this analysis to Rule 807, I refer to the potentially unreliable evidence as "the hearsay." Much of this analysis could apply to other evidence—my aim is to address corroboration generally—but as corroboration admissibility rules largely apply to hearsay, that focus is appropriate here.

weigh the child's hearsay more heavily after learning that medical evidence supported it.

To see why, by somewhat imperfect analogy, take the following contrived, non-legal example.<sup>138</sup> A king has purchased a crown, and he wants to determine whether it is made of pure gold, as promised, or a silver alloy that shady goldsmiths use. He gives the crown to Archimedes for testing. Archimedes uses his ingenious water-displacement method to determine the volume of the crown, and from that, he derives that if the crown is pure gold, it will weigh 4 kilograms, but if it's the alloy, it will weigh 3 kilograms. But Archimedes has a problem: He's not sure whether his scale is reliable. He bought the scale from a reputable manufacturer, but sometimes scientific instruments come poorly calibrated, and he doesn't have the tools to test it directly.

He also has another piece of evidence: the crown looks like pure gold. He can't be sure, but the crown looks more like the gold he's seen than the silver alloy he's seen. Considering the prevalence of pure gold and silver alloy, this evidence gives Archimedes a reason to believe that the crown is more likely than not pure gold. Archimedes puts the crown on the scale, and it reads out "4 kilograms," suggesting the crown is pure gold.

Archimedes is uncertain about two facts: the composition of the crown (the fact of interest) and the reliability of the scale. To determine how a rational factfinder would update his beliefs about each of those facts, given the new evidence that the scale reads "4 kg," I look to Bayesian updating. Bayes' theorem models how a rational factfinder should update his beliefs about some fact as he receives new evidence.<sup>139</sup> The theory assumes that the factfinder begins with some level of belief that a hypothesis—the crown is pure gold, for example—is true. This is called the "prior odds."<sup>140</sup> The factfinder then adjusts his prior

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<sup>138</sup> This example is taken from Ing-Haw Cheng & Alice Hsiaw, *Distrust in Experts and the Origins of Disagreement*, 200 J. ECON. THEORY, no. 105401, at 2 (2022), and modified and enhanced by the story of Archimedes and the Golden Crown, see Chris Rorres, *The Golden Crown: Introduction*, <https://www.math.nyu.edu/~crrorres/Archimedes/Crown/CrownIntro.html> [<https://perma.cc/WSX9-LR4F>] (last visited Apr. 12, 2023).

<sup>139</sup> See Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1023 (1977).

<sup>140</sup> Richard D. Friedman, *A Very Brief Primer on Bayesian Methods in Evidence*, AALS SECTION ON EVIDENCE NEWSL. (Ass'n Am. L. Schs., Wash., D.C.), 2002, at 3, 3–4. More precisely, the prior odds are "the starting ratio between the probability of one event . . . and the probability of another event . . ." Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1266 (2013).

odds that the hypothesis is true using Bayes' Rule,<sup>141</sup> an equation derived from probability theory. This adjustment requires multiplying his prior odds by a "likelihood ratio," a measure of the strength of the new evidence. The likelihood ratio represents how consistent the new evidence is with one hypothesis ("the crown is gold") as opposed to another ("the crown is a silver alloy").<sup>142</sup> More precisely, it is the probability of observing the evidence if the first hypothesis is true, divided by the probability of observing the evidence if the alternative hypothesis is true. By multiplying his prior odds by the likelihood ratio, the factfinder derives "posterior odds," a new level of belief in the hypothesis.<sup>143</sup>

A rational, Bayesian Archimedes would use his new evidence to update each of these beliefs with reference to his priors.<sup>144</sup> To update his beliefs about scale reliability, he would first consider his prior belief that the scale was reliable, accounting for the reputation of the manufacturer, the percent of scales that are unreliable upon purchase, his inability to test the scale, and any other relevant information he has. Then, to calculate his likelihood ratio, he would recognize that the scale gave him the result he expected: the crown weighed in at 4 kg. And he expected this result only because of the corroborating evidence: the crown has a color more typical of pure gold and less typical of silver alloy. Since he already had reason to believe that the crown weighed 4 kg, if we assume an unreliable scale is equally likely to read out either number, he is justified in believing that the scale is more likely to read out "4 kg" if it's reliable than if it's unreliable. Because his likelihood ratio is greater than one, his posterior belief in the scale's reliability is

<sup>141</sup> For the derivation of Bayes' Rule, see Michael O. Finkelstein & William B. Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489, 498–99 (1970), and Lempert, *Modeling Relevance*, *supra* note 139, at 1022–24, 1023 n.12.

<sup>142</sup> See I.J. Good, *Weight of Evidence: A Brief Survey*, in *BAYESIAN STATISTICS 2*, at 249, 250–52 (J.M. Bernardo, M.H. Degroot, D.V. Lindley & A.F.M. Smith eds., 1985) ("[W]eight of evidence is equal to the logarithm of the Bayes factor [or likelihood ratio].").

<sup>143</sup> Bayes' Rule can be expressed as follows, where H is the hypothesis ("the crown is gold"), E is the evidence ("the scale reads 4 kg"), and P(A—B) is the probability of A given B. The term on the left side of the equation is the posterior odds; the first term on the right is the likelihood ratio, and the final term is the prior odds:

$$\frac{P(H|E)}{P(\sim H|E)} = \frac{P(E|H)}{P(E|\sim H)} * \frac{P(H)}{P(\sim H)}$$

<sup>144</sup> If he were interested in the *joint* probability—the probability that the scale is reliable *and* the crown is gold—he could obtain a single, joint posterior. See Cheng & Hsiaw, *supra* note 138, at 6.

greater than his prior belief. The readout gave him a reason to strengthen his belief in the reliability of the scale.<sup>145</sup>

To update his beliefs about the composition of the crown, he would do the same: he would first consider his prior level of belief that the crown is gold, accounting for its color, the proportion of goldsmiths that are honest, and any other relevant facts. Then, he would calculate a likelihood ratio: the ratio of the probability that the scale would read 4 kg if the crown were gold to the probability that the scale would read 4 kg if the crown were silver alloy. This number will depend, in large part, on his belief that the scale is reliable. A reliable scale is *much* more likely to read 4 kg if the crown is gold than if it's silver, whereas a very unreliable scale might be equally likely to read 4 kg no matter whether it's gold or silver. So, Archimedes should consider the information he has about the scale's reliability, including the reputation of the manufacturer, the percent of scales that are unreliable upon purchase, his inability to test the scale, and any other relevant information he has. And from that, he should formulate a likelihood ratio and update his prior belief about the crown's composition. Assuming he has *some* reason to believe the scale is reliable, the readout of "4 kg" will increase the strength of Archimedes' belief that the crown is pure gold. His posterior belief, then, will account for both pieces of evidence: the color of the crown and the scale readout.<sup>146</sup>

<sup>145</sup> For example, say Archimedes begins with a belief of .5 that the crown is gold and a belief of .6 that the scale is reliable. The appearance of the crown causes him to update his belief that the crown is gold to .7. He then weighs the crown, and the scale reads out 4 kg. Assume the following conditional probabilities: if the scale is reliable and the crown is gold, the probability that it will read 4 kg is 1, or  $P(E|G, R) = 1$ . If it's reliable and the crown is not gold, the probability it will read 4 kg is 0, or  $P(E|\sim G, R) = 0$ . If it's not reliable, the probability that it will read 4 kg is 50%, independent of whether the crown is gold or not:  $P(E|G, \sim R) = 0.5$ ;  $P(E|\sim G, \sim R) = 0.5$ . To update his belief on reliability, Archimedes would go through the following reasoning:

$$\begin{aligned} \frac{P(R|E)}{P(\sim R|E)} &= \frac{P(R)}{P(\sim R)} * \frac{P(E|R)}{P(E|\sim R)} \\ &= \frac{P(R)}{P(\sim R)} * \frac{P(G)*P(E|G,R)+P(\sim G)*P(E|\sim G,R)}{P(G)*P(E|G,\sim R)+P(\sim G)*P(E|\sim G,\sim R)} \\ &= \frac{.6}{.4} * \frac{.7(1)+.3(0)}{.7(.5)+.3(.5)} = \frac{.6}{.4} * \frac{.7}{.5} = \frac{.42}{.2} \rightarrow P(R|E) = .677 \end{aligned}$$

His updated, posterior probability of reliability is .677, higher than his prior probability of .6.

<sup>146</sup> Taking the same situation as in the previous example, Archimedes would go through the following reasoning:

What Archimedes should *not* do is, *first* use the evidence of both the color of the crown and the readout to update his belief that the scale is reliable, and *then* use that *new estimate of scale reliability* to update his belief about the crown's composition.<sup>147</sup> That would be an error and a departure from Bayesian updating—it would be a reasoning process analogous to confirmation bias, “the tendency of persons to seek out and assign more weight to evidence that confirms a prior belief or hypothesis than to evidence disconfirming it.”<sup>148</sup> Confirmation bias comprises two related propensities: selective exposure, “choosing only information that supports one's beliefs and disregarding conflicting information”<sup>149</sup> and biased assimilation, discounting evidence that contradicts one's beliefs while giving substantial weight to evidence that confirms those beliefs.<sup>150</sup>

$$\begin{aligned} \frac{P(G|E)}{P(\sim G|E)} &= \frac{P(G)}{P(\sim G)} * \frac{P(E|G)}{P(E|\sim G)} \\ &= \frac{P(G)}{P(\sim G)} * \frac{P(R)*P(E|G,R)+P(\sim R)*P(E|G,\sim R)}{P(R)*P(E|\sim G,R)+P(\sim R)*P(E|\sim G,\sim R)} \\ &= \frac{.7}{.3} * \frac{.6(1)+.4(.5)}{.6(0)+.4(.5)} = \frac{.7}{.3} * \frac{.8}{.2} = \frac{.56}{.06} \rightarrow P(G|E) = .903 \end{aligned}$$

His updated, posterior probability of the crown being gold is .903, which is higher than his prior probability of .7.

<sup>147</sup> This would be like the previous footnote, but substituting the updated reliability estimate, where P\* is the erroneously measured probability:

$$\begin{aligned} \frac{P^*(G|E)}{P^*(\sim G|E)} &= \frac{P(G)}{P(\sim G)} * \frac{P(E|G)}{P(E|\sim G)} \\ &= \frac{P(G)}{P(\sim G)} * \frac{P(R|E)*P(E|G,R)+P(\sim R|E)*P(E|G,\sim R)}{P(R|E)*P(E|\sim G,R)+P(\sim R|E)*P(E|\sim G,\sim R)} \\ &= \frac{.7}{.3} * \frac{.677(1)+.323(.5)}{.677(0)+.323(.5)} = \frac{.7}{.3} * \frac{.8385}{.1615} = \frac{.58695}{.04845} \rightarrow P^*(G|E) = .924 \end{aligned}$$

His updated posterior probability is .924, which is higher than the “Bayesian benchmark” of .903. He has overestimated the probability that the crown is gold.

<sup>148</sup> Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 121 n.26 (2007); see also Moa Lidén, Minna Gräns & Peter Juslin, *The Presumption of Guilt in Suspect Interrogations: Apprehension as a Trigger of Confirmation Bias and Debiasing Techniques*, 42 LAW & HUM. BEHAV. 336, 336 (2018) (defining “confirmation bias” as “a cognitive tendency to search for and evaluate information in ways that are partial to an already formed hypothesis”).

<sup>149</sup> Susanne M. Schmittat & Birte Englisch, *If You Judge, Investigate! Responsibility Reduces Confirmatory Information Processing in Legal Experts*, 22 PSYCH. PUB. POLY & L. 386, 387 (2016).

<sup>150</sup> See Dan M. Kahan, Donald Braman, Geoffrey L. Cohen, John Gastil & Paul Slovic, *Who Fears the HPV Vaccine, Who Doesn't, and Why? An Experimental Study of the Mechanisms of Cultural Cognition*, 34 LAW & HUM. BEHAV. 501, 504 (2010) (“Biased assimilation refers to the tendency of individuals selectively to credit and dismiss information in a manner that confirms their prior beliefs.”); Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098, 2099 (1979) (“[I]ndividuals will dismiss and



As the “bias” in “confirmation bias” indicates, both of these cognitive tendencies inhibit truth-seeking.<sup>151</sup> Over time, selective exposure and biased assimilation can lead to the sort of polarization we see in political discourse, where different groups have wildly divergent views of relevant facts.<sup>152</sup> Using corroboration—here, the color of the crown—in order to estimate scale reliability and thereby formulate the likelihood ratio for new evidence—here, the scale readout—resembles biased assimilation. The evidence that the scale reads “4 kg” gets *more weight* because it conforms with Archimedes’ prior belief that the crown is probably gold.

More precisely, this error in reasoning mirrors the errors articulated in two recent papers that seek to explain why people who receive identical evidence sometimes fail to converge in their beliefs. Economists Ing-Haw Cheng and Alice Hsiaw hypothesize that when people receive information about a fact from a source of uncertain credibility, they depart from Bayesian learning through a process of “pre-screening.”<sup>153</sup> A pre-screener *first* updates her beliefs about the source’s credibility using her factual priors and the information from the source, *then* uses this updated credibility to formulate her likelihood ratio—in other words, to determine how much weight to give the information in forming her posterior belief about the fact.<sup>154</sup> This means that the order in which a pre-screener receives her evidence affects her posterior belief in the fact. Bayesian updating, by contrast, is order-independent.<sup>155</sup> By

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discount empirical evidence that contradicts their initial views but will derive support from evidence, of no greater probativeness, that seems consistent with their views.”).

<sup>151</sup> See Dan Kahan, *Doc., Please Level With Me: Is My Likelihood Ratio Infected by My Priors?!*, CULTURAL COGNITION PROJECT: BLOG (Aug. 29, 2012), <http://www.culturalcognition.squarespace.com/blog/2012/8/29/doc-please-level-with-me-is-my-likelihood-ratio-infected-by.html> [<https://perma.cc/W9UK-P92F>]; Marsha S. Berzon, *Dissent, “Dissentals,” and Decision Making*, 100 CAL. L. REV. 1479, 1482 (2012) (characterizing confirmation bias as a “deviation[] from rational decision making”); Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 314 (2010) (“[C]onfirmation bias undermines an observer’s neutral processing of information in a dispute.”); Aaron J. Wright, Note, *Rendered Impracticable: Behavioral Economics and the Impracticability Doctrine*, 26 CARDOZO L. REV. 2183, 2204–05 (2005).

<sup>152</sup> See generally Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149 (2006) (discussing “the epistemic origins of political conflict,” including biased assimilation and other cognitive mechanisms).

<sup>153</sup> Cheng & Hsiaw, *supra* note 138, at 2.

<sup>154</sup> *Id.* at 5–6. Cheng and Hsiaw propose that the second update is a *joint* update on both source credibility and the fact. The error holds where the second update is *only* on the fact of interest.

<sup>155</sup> *Id.* at 3.

using the evidence first to update her beliefs about the source's credibility and then to formulate her likelihood ratio, the pre-screener "double-dips the data."<sup>156</sup> "A Bayesian," on the other hand, "always<sup>157</sup> carefully separates her priors from the likelihood of the data."<sup>158</sup>

Political scientist Korhan Koçak proposes a similar explanation for polarization in the face of identical evidence.<sup>159</sup> When a person wants to use new data to update her beliefs about two parameters—say, the quality of the source and the state of the world—cognitive limitations prevent her from using her priors to update her beliefs about both parameters simultaneously. Instead, she will first update one and then errone-

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<sup>156</sup> *Id.* at 6.

<sup>157</sup> At least one Bayesian technique—"empirical Bayes" estimation—does double-dip the data. Take the following scenario: We are trying to predict a professional baseball player's long-term batting average from his first 45 at-bats. We might initially think that the best estimate is simply his batting average after 45 turns at the plate. However, there is a way to get a better prediction: we can *first* use as our prior the distribution of *all* the batting averages of players who have had 45 at-bats to date, and we can then *update* that prior for each batter using his individual performance after 45 at-bats. See David Robinson, *Understanding Empirical Bayes Estimation (Using Baseball Statistics)*, VARIANCE EXPLAINED (Oct. 1, 2015), [http://varianceexplained.org/r/empirical\\_bayes\\_baseball/](http://varianceexplained.org/r/empirical_bayes_baseball/) [<https://perma.cc/8F7T-GF94>]; see also Bradley Efron & Carl Morris, *Stein's Paradox in Statistics*, SCI. AM., May 1977, at 119, 119 (using the closely related James-Stein estimator); Hillel J. Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 U.C. DAVIS L. REV. 1019, 1043–44 (2023). More generally, a researcher using empirical Bayes estimation *first uses their data set to estimate a prior*, and then uses each individual observation in the set to update that prior and calculate an individual posterior. See Robinson, *supra*; ANDREW GELMAN ET AL., *BAYESIAN DATA ANALYSIS* 102–04 (3d ed. 2021), <http://www.stat.columbia.edu/~gelman/book/BDA3.pdf> [<https://perma.cc/EKC3-QP7W>]. Outlier data points, such as very high batting averages, will regress to the mean, so this process is sometimes called "shrinkage estimation." See Bavli, *supra*, at 1043–44. Empirical Bayes estimation uses the data *both* to estimate the prior *and* to update that prior, so in that way, it double-dips the data.

Empirical Bayes estimation does not undermine my point, however. First, even those who use empirical Bayes recognize it has "logical and practical problems," including that "the data would be used twice," GELMAN ET AL., *supra*, at 103, and is "not the typical Bayesian approach," Robinson, *supra*, but rather differs from "an ordinary, fully Bayesian analysis." Bradley P. Carlin & Thomas A. Louis, *Empirical Bayes: Past, Present, and Future*, 95 J. AM. STATISTICAL ASS'N 1286, 1286 (2000). Further, empirical Bayes is used on datasets to form previously unknown priors. My discussion applies to an individual case where the factfinder has some subjective prior before receiving the new evidence, and the issue is whether to use the corroboration to update the likelihood ratio of that new evidence.

<sup>158</sup> Cheng & Hsiaw, *supra* note 138, at 6.

<sup>159</sup> See Korhan Koçak, *Sequential Updating: A Behavioral Model of Belief Change* (Apr. 7, 2018) (unpublished manuscript), <https://www.korhankocak.com/publication/bp/BP.pdf> [<https://perma.cc/4RRC-9RKG>].

ously use her posteriors on the first to update the second.<sup>160</sup> When the person first updates on the quality of the source and then uses that posterior to update her beliefs about the state of the world, her posterior “on the state of the world is slanted towards her prior relative to the Bayesian benchmark.”<sup>161</sup>

If Archimedes first uses the “4 kg” readout to update his belief about the reliability of the scale and *then* uses his new-found trust in the scale to update his belief that the crown is pure gold, he will overestimate the probability that it is pure gold, relative to the “Bayesian benchmark.”

This “Bayesian benchmark” is, I maintain, the best Archimedes can hope to do in terms of accurately estimating the probability that the crown is gold. It is true that Archimedes must use *subjective* probabilities when determining both his prior and the weight to give the evidence; he likely does not have reliable data on the proportion of objects from goldsmiths that are actually a silver alloy, nor how likely an unreliable scale is to give him the correct weight by coincidence. And it is true that if these subjective probabilities are off the mark, Bayesian updating will not necessarily help Archimedes achieve accuracy. That is one reason why some have criticized probabilistic models of evidence as unhelpful to achieving accuracy,<sup>162</sup> even if Bayesian updating is *logically* sound.<sup>163</sup> But if Archimedes’ probabilities *are* close to “objective” probabilities, Bayesian updating should help him, on average, get closer to the truth.<sup>164</sup> And Archimedes, through his life experience, likely has *some* idea of what these probabilities are, based on truth.<sup>165</sup>

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<sup>160</sup> *Id.* at 2–5.

<sup>161</sup> *Id.* at 4.

<sup>162</sup> *E.g.*, Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1508–09 (2001).

<sup>163</sup> See Michael S. Pardo, *Epistemology, Psychology, and Standards of Proof: An Essay on Risinger’s “Surprise” Theory*, 48 SETON HALL L. REV. 1039, 1043 n.20 (2018).

<sup>164</sup> See Alvin I. Goldman, *Quasi-Objective Bayesianism and Legal Evidence*, 42 JURIMETRICS J. 237, 239–40 (2002). Goldman argues that we can “countenance the existence of *objective* likelihoods,” *id.* at 240, 245–51, but others have criticized this idea; the idea that people can accurately estimate likelihoods, and his proposals generally. See Mike Redmayne, *Rationality, Naturalism, and Evidence Law*, 2003 MICH. ST. L. REV. 849, 867 n.85; Ronald J. Allen & Sarah A. Jehl, *Burdens of Persuasion in Civil Cases: Algorithms v. Explanations*, 2003 MICH. ST. L. REV. 893, 932 n.149; Don Fallis, *Goldman on Probabilistic Inference*, 109 PHIL. STUD. 223, 237 (2002).

<sup>165</sup> Indeed, many Rules of Evidence can be understood to prevent jurors from receiving evidence when they will misestimate the likelihood ratio. See Lempert, *supra* note 139, at 1027–30; Goldman, *supra* note 164, at 241.

Of course, Archimedes is a stand-in for a factfinder, let's say a juror. The government—the court, not the king—has asked the juror to determine a historical fact. The juror gets evidence from a hearsay declarant, not a scale of questionable reliability, and that declarant's statement may be corroborated by another witness or by physical evidence (maybe, but probably not, the color of a material). For example, say the fact of interest is whether the defendant was at the scene of the crime. A hearsay declarant says she saw him there. And the prosecution has corroborating evidence: a fingerprint from the crime scene that matches the defendant.

Just like Archimedes, a juror would err by first using the agreement between the hearsay and the corroborating evidence to update her belief about the reliability of the hearsay, and then weighting the hearsay in accordance with that updated belief. To do so would be to “double-dip.” While Cheng and Hsiaw refer to double-dipping the *data*, meaning the hearsay declarant's statement, this could just as easily be understood as double-dipping the corroboration. The corroboration both contributes to the weight given to the hearsay and independently contributes to the juror's estimate of the fact of interest—the defendant's commission of the crime, for example.<sup>166</sup> This is a deviation from rational Bayesian updating. The rational Bayesian, instead, would evaluate the reliability of both the corroboration and the hearsay independently,<sup>167</sup> then use both as evidence of, for example, the defendant's presence at the scene. The case against the defendant is stronger if the hearsay is corroborated, but that is because there are two pieces of evidence against the defendant, rather than one. It is not because that hearsay is more likely to be reliable. As Mike Redmayne put it, “The corroborating evidence does not increase the probative value of the corroborated evidence. Metaphorically, it adds another strand to the rope; it does not increase the strength of the existing strand.”<sup>168</sup>

Another way of showing this—more precise, if not as narratively gripping—is through a Bayesian network. Bayesian networks are “graphical probabilistic models”<sup>169</sup> that show how multiple pieces of evidence relate to each other and how “the

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<sup>166</sup> This is how Mike Redmayne discusses this problem, as “double-count[ing]” the corroborative evidence. See Redmayne, *supra* note 114, at 151.

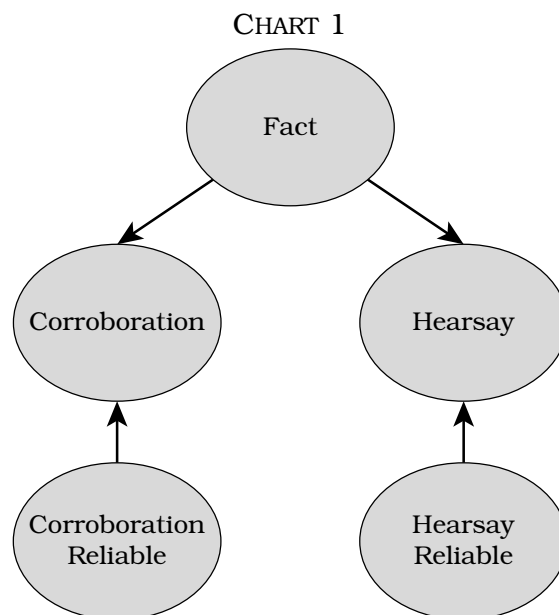
<sup>167</sup> This assumes that the corroboration and the hearsay are conditionally independent, given the fact of interest, a point I return to in Part II.B.2.

<sup>168</sup> Redmayne, *supra* note 114, at 152.

<sup>169</sup> Alex Biedermann & Jonathan J. Koehler, *Influence Diagrams for Complex Litigation*, 62 JURIMETRICS J. 131, 148 (2022).

probabilistic influence of [a new item of] evidence propagates throughout the network.”<sup>170</sup> A Bayesian network consists of two components: (1) a directed acyclic graph, where the nodes represent variables of interest (a characteristic of a person, the occurrence of some event, etc.) and the arrows represent dependence relationships between those variables; and (2) conditional probability tables that show the strength of those relationships.<sup>171</sup>

A Bayesian network for corroboration will show the relationship between the fact of interest, the accusatory hearsay statement, the reliability of the hearsay statement, the corroborating evidence, and the reliability of that evidence. The probability of receiving some evidence—such as the declarant’s accusatory statement—depends on two variables: (1) whether the fact it tends to prove is true or not, and (2) whether the process that generated it is reliable. Therefore, the graphical component of the Bayesian network should look like this:<sup>172</sup>



<sup>170</sup> David A. Schum, *Alternative Views of Argument Construction from a Mass of Evidence*, 22 CARDOZO L. REV. 1461, 1466 (2001).

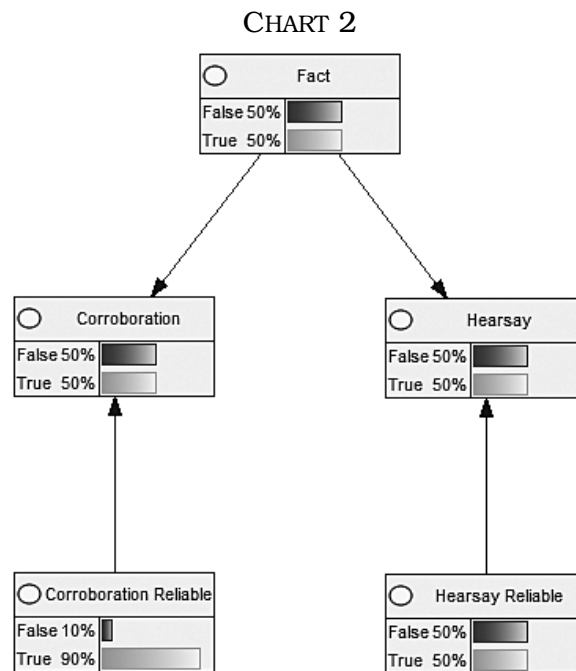
<sup>171</sup> Judea Pearl, *Bayesian Networks*, in THE MIT ENCYCLOPEDIA OF THE COGNITIVE SCIENCES 72, 72 (Robert A. Wilson & Frank C. Keil eds., 1999); Rafal Urbaniak & Marcello Di Bello, *Legal Probabilism*, STAN. ENCYCLOPEDIA PHIL. (June 8, 2021), <https://plato.stanford.edu/archives/fall2021/entries/legal-probabilism/> [https://perma.cc/RAE7-UCDJ].

<sup>172</sup> See Toby D. Pilditch, Sandra Lagator & David Lagnado, *Strange but True: Corroboration and Base Rate Neglect*, 47 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY & COGNITION 11, 13 fig.1 (2021).

If the defendant committed the crime and the hearsay is reliable, it is very likely that the hearsay statement will accuse the defendant. If the defendant did *not* commit the crime and the hearsay is reliable, it is very likely that the hearsay statement will *not* accuse the defendant. If the hearsay is unreliable, its content will not correlate closely with the truth. So, we might have the following conditional probabilities: If the evidence is reliable, there is a 90% probability that it will agree with the fact. If the evidence is unreliable, there is a 50% probability that it will agree with the fact.

Several software programs allow users to model Bayesian networks and observe how evidence influences other variables in the network. I use GeNIe Modeler<sup>173</sup> to show how the relevant probabilities evolve with each new piece of evidence.

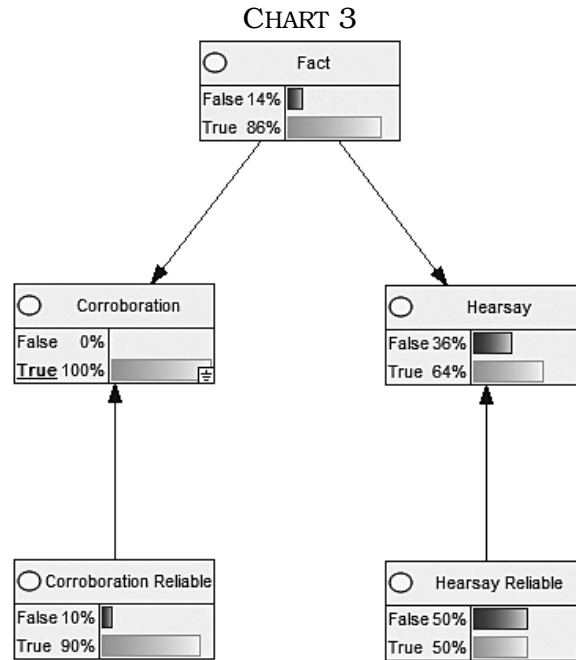
We begin with a 50% prior probability of the fact of interest. Since we are fairly confident in the corroboration's reliability, we will start with a 90% probability that the corroboration is reliable but only a 50% probability that the hearsay is reliable:



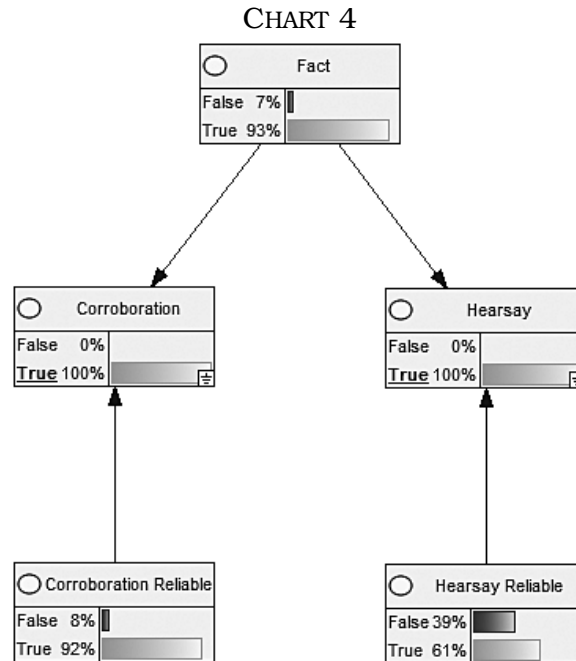
First, the corroborating evidence comes in, supporting the contested fact. This does not change the likelihood that the corroboration is reliable, because our prior on the contested

<sup>173</sup> BAYESFUSION, *GeNIe Modeler*, <https://www.bayesfusion.com/genie/> [<https://perma.cc/U7GF-VKKV>].

fact was 50-50, and an unreliable witness agrees with the fact with a 50% probability, but it increases the probability that the fact is true to 86%:



Next, the hearsay statement comes in, also supporting the contested fact. This *does* change the likelihood that the hearsay and the corroboration are reliable because they both support a fact that is likely true:



Crucially, however, the posterior probability of the fact—93% probability of truth—is based on the *prior* likelihood that the hearsay and corroboration were reliable.<sup>174</sup> If we were to use the *posterior* likelihoods of reliability—92% and 61%—to calculate the posterior probability that the fact is true, we would overestimate that probability.<sup>175</sup>

Bayesian network modeling, therefore, illustrates the intuition that Archimedes built: the hearsay should not be given more weight because it is corroborated.

## 2. Corroboration and Admissibility

Now consider a court that determines whether to admit or exclude a piece of evidence based on whether that evidence is

<sup>174</sup> Recall that the prior probability of the fact was  $P(F)=0.5$ . The prior probabilities of reliability were  $P_C(R)=0.9$ ,  $P_H(R)=0.5$ . And the conditional probabilities were:  $P(E=F,R)=0.9$ ,  $P(E=\sim F,R)=0.1$ ,  $P(E=F,\sim R)=0.5$ ,  $P(E=\sim F,\sim R)=0.5$ . So:

$$\frac{P(F|C,H)}{P(\sim F|C,H)} = \frac{P(F)}{P(\sim F)} * \frac{P(C|F)}{P(C|\sim F)} * \frac{P(H|F)}{P(H|\sim F)}$$

$$\frac{P(F|C,H)}{P(\sim F|C,H)} = \frac{.5}{.5} * \frac{.9(.9)+.1(.5)}{.9(.1)+.1(.5)} * \frac{.5(.9)+.5(.5)}{.5(.1)+.5(.5)} = 1 * \frac{.86}{.14} * \frac{.7}{.3} = \frac{.602}{.042}$$

$$\rightarrow P(F|C,H) = .9348$$

<sup>175</sup> Now we use  $P_C'(R)=0.922$  and  $P_H'(R)=0.612$ :

$$\frac{.5}{.5} * \frac{.922(.9)+.078(.5)}{.922(.1)+.078(.5)} * \frac{.612(.9)+.388(.5)}{.612(.1)+.388(.5)} = \frac{.647}{.033} \rightarrow P'(F|C,H) = .951$$



corroborated. Does this raise the same problem as using corroboration to determine the *weight* of the evidence? The question is difficult, and its answer depends on our understanding of “trustworthiness” and the role of an admissibility determination.

I argue that under predominant understandings, it does raise the same problem. Assume that in a specific case corroboration is determinative of admissibility: either the rule requires corroboration, or corroboration is one consideration,<sup>176</sup> and the other indicia of trustworthiness counsel against admitting the evidence, but it’s close enough that corroboration would tip the scale toward admissibility. In effect, the court has structured the case so if the evidence is corroborated, the jury gives it its full weight—based on direct evidence of inherent trustworthiness and any cognitive limitations that lead the jurors to overweigh the evidence—but if it is not corroborated, the jury gives it no weight at all.

Excluding evidence because it is not corroborated is the equivalent of a combined court-juror entity saying, “Based on other information about this evidence’s reliability, I would give it some weight, but because there is no corroboration of this evidence, I give it no weight.” Including otherwise-excludable evidence because it is corroborated is the equivalent of the court-juror saying, “Based on other information about this evidence’s reliability, I would give it no weight, but because there is corroboration, I give it some weight.” Stronger cases get more evidence; weaker cases don’t. I call this “structural confirmation bias.”

Of course, *whenever* a court excludes evidence because it is untrustworthy, it is the equivalent of forcing a juror to give the evidence no weight instead of the weight that juror would otherwise give it. But when that determination is made on the basis of direct evidence of trustworthiness, it doesn’t raise the confirmation bias concern. Instead, that is a determination by the court (or the Rules) that, based on the circumstances under which this statement was made, it is better for the jury not to rely on it—to give it zero weight—than to rely on it. When it is based on lack of corroboration or on contradiction, however, the court goes against that direct evidence of trustworthiness to double-count other evidence in the case. Corroboration, then, should not be a basis of admissibility or exclusion on the grounds that it assures “trustworthiness.”

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<sup>176</sup> See FED. R. EVID. 807(a)(1).

To think about this another way—and to see more clearly why corroboration-based admissibility decisions can lead jurors astray—consider the following understanding of reliability and criterion for admissibility: evidence is sufficiently trustworthy when, by virtue of the circumstances surrounding its creation, it *merits* enough weight that the actual weight the jury places on it will not harm the factfinding process. In other words, the court is concerned about jurors overestimating the probative value of low-quality, untrustworthy evidence, so it excludes evidence whenever it anticipates that jurors will ascribe probative value to the evidence that is so much higher than its actual probative value that admitting the evidence will harm rational truth-seeking.<sup>177</sup>

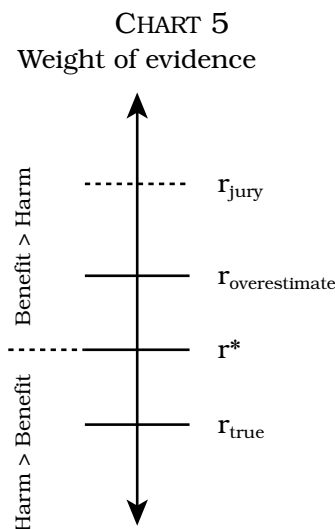
Say we have a piece of potentially unreliable evidence, such as a hearsay statement. And say the court can anticipate that the jury will ascribe a likelihood ratio of  $r_{jury}$  to the statement based on its apparent reliability, as depicted below. The court should admit the evidence if its “true” likelihood ratio—the value that an ideal jury would assign it—is at least  $r^*$ , some value at which the jury’s overestimation doesn’t outweigh the value of the evidence.<sup>178</sup> Now say the best estimate of the true likelihood ratio of the evidence, not considering any corroboration, is  $r_{true} < r^*$ . In other words, the likelihood ratio an ideal juror would assign the evidence is so low that the jury’s overestimation of the evidence will cause more harm than good. The court should exclude the evidence because the jury will give it too much weight. But if the evidence is corroborated, and if the court acts like Bad Archimedes and considers the corroboration in evaluating the likelihood ratio of the evidence, it will incorrectly impute a likelihood ratio to the evidence of  $r_{overestimate} > r^*$ . Since  $r_{overestimate}$  exceeds the threshold of  $r^*$ , the court will admit evidence that it properly should have excluded, thereby harming factfinding.<sup>179</sup> The opposite could be true

<sup>177</sup> See *infra* notes 248–254 and accompanying text.

<sup>178</sup> Louis Kaplow and Richard Friedman have both observed that evidence should be excluded only if the jury’s overvaluation exceeds the value of the evidence itself. In other words, it should be excluded only if the jury will ascribe more than twice as much value to it as it merits. Kaplow, *supra* note 122, at 1790; Friedman, *Over-Valuation Concern*, *supra* note 122, at 969. Neither one appears to be asserting that the *likelihood ratio* ascribed to the evidence must be twice the true likelihood ratio for exclusion. Kaplow, for one, refers to a 0-100 scale of credibility and suggests that if the true value is at least a 50, overvaluation is impossible. Kaplow, *supra* note 122, at 1789–90.

<sup>179</sup> Another concern arises with corroborated evidence: *jurors* will attribute a higher value to it than they will to uncorroborated evidence, exacerbating the problem. See *infra* notes 237–240 and accompanying text. The gap between the

where a court docks evidence based on lack of corroboration or contradiction: evidence that had a high enough likelihood ratio to *help* factfinding will be excluded.



This model contains a few important assumptions: First, it assumes we can translate trustworthiness—the focus of the court’s determination—into a likelihood ratio. Intuitively, that doesn’t quite fit with our understanding of “inherent trustworthiness,” meaning that evidence was produced “in a way that tends to create accurate evidence, so jurors can put as much credence in it as they would testimony that has survived the test of cross-examination.”<sup>180</sup> This definition suggests something different from the strength of the evidence.

However, there is, or at least should be, a very close correspondence between trustworthiness and likelihood ratio. The likelihood ratio is the probability of the evidence arising if the hypothesis is true, divided by the probability of the evidence arising if the hypothesis is false.<sup>181</sup> Say the jury must determine whether hypothesis H—“the defendant hit the declarant”—is true. The evidence, E, is the child declarant stating, “the defendant hit me.” If the declarant made the statement under circumstances that tend to produce accurate evidence—

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actual and perceived probative value of corroborated hearsay, then, will be even larger than the gap between the actual and perceived value of hearsay under normal circumstances. But that is an empirical observation, not a theoretical problem.

<sup>180</sup> See *supra* text accompanying note 127; see also *supra* text accompanying notes 123–130.

<sup>181</sup> Richard D. Friedman, Commentary, *A Presumption of Innocence, Not of Even Odds*, 52 STAN. L. REV. 873, 875 (2000).

he was asked open-ended questions, and he was not influenced by another adult—then he is likely to make the statement if H is true and unlikely to make the statement if H is false. The likelihood ratio is high. If the statement was made under circumstances that less reliably produce accurate evidence—he was asked leading questions, and biased adults attempted to influence him—then he is nearly as likely to make the statement if H is false as he is if H is true. The likelihood ratio will be much closer to 1. So, it is reasonable to think of the danger of untrustworthiness as jurors giving too much weight to low-likelihood-ratio evidence.

Second, and more controversially, it assumes that the court should truly be basing its admissibility decision on the inherent trustworthiness of the evidence and not on the strength of the case as a whole. One possible objection is: if the potentially unreliable evidence is corroborated, then the two pieces of evidence *together* provide strong proof of the fact at issue, and any unreliability concerns with one piece are less troubling than they would be in isolation.

There is something to this objection, in that it sounds a lot like an approach to Rule 403 that Dan Kahan has argued for<sup>182</sup> and I have previously used.<sup>183</sup> Federal Rule of Evidence 403 permits courts to exclude evidence if its probative value is substantially outweighed by a risk of unfair prejudice.<sup>184</sup> Under one approach,<sup>185</sup> a judge weighing probative value against prejudice should compare the marginal likelihood of error due to admitting the evidence to the marginal likelihood of error due to excluding the evidence and exclude it “only if the former exceeds the latter.”<sup>186</sup> In making this determination, the court should not look at the evidence in isolation, but rather “take account of the full evidentiary context of the case as the court understands it.”<sup>187</sup> Kahan notes that in otherwise weak cases,

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<sup>182</sup> See Dan M. Kahan, *The Economics—Conventional, Behavioral, and Political—of “Subsequent Remedial Measures” Evidence*, 110 COLUM. L. REV. 1616, 1634 (2010).

<sup>183</sup> See Wittlin, *supra* note 136, at 1371.

<sup>184</sup> FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

<sup>185</sup> He analyzes subsequent-remedial-measure evidence of the type excluded by Rule 407, but the analysis is applicable to Rule 403 inquiries more broadly.

<sup>186</sup> Kahan, *supra* note 182, at 1634.

<sup>187</sup> *Old Chief v. United States*, 519 U.S. 172, 182 (1997). In *Old Chief*, the “full evidentiary context” was *alternative* evidence, not additional evidence. Under that case, courts should be less likely to admit prejudicial evidence if there is a less prejudicial *alternative*.

prejudicial evidence risks error because the jury is likely to seriously overestimate its value, finding for the introducing party—say, a plaintiff in a civil case—when that party has not satisfied its burden of proof.<sup>188</sup> In otherwise close cases, however, the legitimate probative value may carry the evidence over the burden of proof threshold, so excluding the evidence creates a greater danger of error than including it.<sup>189</sup>

Should a court make the same move when the specific concern is trustworthiness or reliability? If the logic of a corroboration rule is, “corroboration tells us something about *how inherently trustworthy* the evidence is, and *therefore*, whether we should admit it,” then no. The logic of the Rule 403 approach described is not that the challenged evidence is made *inherently* better by the strong case. It is not that the strength of the case tells us something about the challenged evidence *itself*. Rather, it is that the probative value of evidence should be understood as something other than the inherent quality of the evidence: it’s an all-things-considered determination of whether the evidence is more likely than not to steer the jury to the correct answer.

That suggests a different understanding of what “trustworthiness” means and what the role of an admissibility determination is. The question is not, “is this evidence trustworthy enough such that it allows for rational updating on the part of jurors?” but rather, “does the true probative value of all of the evidence likely satisfy the burden of proof, such that the jury should be best enabled to reach that decision?” In other words, it looks to the probability that the fact at issue is *true*. I address this understanding of “trustworthiness” later and explain why I believe it is better reserved for sufficiency determinations than admissibility determinations.<sup>190</sup> For now, I continue under the assumption that the court is looking to admit evidence sufficiently trustworthy that it assists the jury’s rational updating.

### 3. *Unproblematic Corroboration*

I’ve shown that *some* corroboration should not be part of a court’s trustworthiness analysis. But is *any* corroboration helpful? This Section discusses one possibility.

Take the following example. Hours after a homicide, a declarant—now deceased—said to her partner, “I saw the most

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<sup>188</sup> Kahan, *supra* note 182, at 1636.

<sup>189</sup> *Id.* at 1636–37.

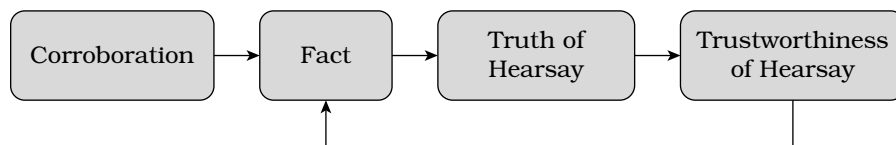
<sup>190</sup> See *infra* Part II.C.3.

horrible thing today. At the corner of 62nd and Amsterdam, a petite woman with short grey hair was talking with an elderly man. The woman said, ‘Too bad you never got to enjoy your retirement,’ and then shot the man.” At trial, a witness testifies that he was walking up Amsterdam Avenue, just south of 62nd Street, when he heard a woman’s voice say, “Too bad you never got to enjoy your retirement,” followed by a gunshot. He then testifies that he saw the defendant—a petite woman with short grey hair—come around the corner and head north on Amsterdam. Per the discussion above, if the hearsay is admitted, the jury should not consider the witness’s corroboration of the declarant’s description of the defendant as evidence that the declarant is trustworthy and should be believed on her description of the killer. But what about the corroboration of the murderer’s statement, “Too bad you never got to enjoy your retirement”? That seems meaningfully different. Why?

The logical problem with using corroboration to determine trustworthiness was the double-dipping into the evidence: the corroboration went both to the weight of the hearsay and to the disputed material fact that both the hearsay and the corroboration tended to prove. Here, the corroboration does not serve that double function.

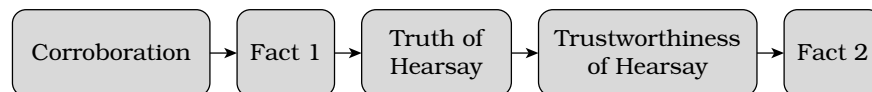
To visualize the contrast, an improper chain of reasoning looks like this:

CHART 6



Whereas the proper chain of reasoning in this example looks like this:

CHART 7



In this example, the corroboration is being used to prove that the declarant was accurate on one fact—what the killer said before she shot the victim—and her statement is therefore more likely to be truthful and trustworthy, and so she is more likely to be telling the truth about the fact of interest: what the killer looked like.

There are several potential concerns with this “other-fact” corroboration. For one, in *Idaho v. Wright*, Justice O’Connor asserted, “Corroboration of a child’s allegations of sexual abuse by medical evidence of abuse . . . sheds no light on the reliability of the child’s allegations regarding the identity of the abuser.”<sup>191</sup> Using corroboration of what the killer said to shed light on the reliability of the declarant’s description of the killer seems to present the same problem. But Justice O’Connor is wrong that corroboration of one part of a statement sheds *no light* on the reliability of the rest of the statement.<sup>192</sup> If a declarant is accurate on one part of her statement, that increases the probability that she possessed strong “testimonial capacities” when she made the hearsay statement—that she was sincere and articulate, and she accurately perceived the events of the evening and remembered them. Those capacities would speak to the truth of other portions of the statement as well. This is the flip side of the old rule of “*falsus in uno, falsus in omnibus*”: a previously mandatory doctrine that “held that a witness who lied about any material fact must be disbelieved as to all facts.”<sup>193</sup> That rule, from a truth-seeking perspective, was too extreme: a witness might lie about some things and tell the truth about others. But it recognizes a within-witness accuracy correlation.

Just as the “*falsus in uno, falsus in omnibus*” rule was too absolute, accuracy on one portion of a declarant’s statement does not conclusively prove accuracy on other portions of the statement. A child might, of course, correctly remember abuse but misidentify the perpetrator, or a hearsay declarant might correctly remember what a killer said but misrepresent what she looked like. But truth on one point is correlated with, and therefore probative of, truth on the other points. *How strong* that correlation is varies. The relevant question is: How probable is it that this fact would be corroborated, given that the declarant’s story as a whole is false?<sup>194</sup> The higher that

<sup>191</sup> *Idaho v. Wright*, 497 U.S. 805, 824 (1990).

<sup>192</sup> See Capra, *supra* note 12, at 1585 (“[I]f she is right about one fact, it makes it more likely that she is right about other asserted facts.”).

<sup>193</sup> George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 654, 655 (1997).

<sup>194</sup> We can put this in Bayesian terms. The updated odds that a declarant’s story as a whole is true, given that one fact in the story was confirmed, are:

$$\frac{P(S|F)}{P(\sim S|F)} = \frac{1}{P(F|\sim S)} * \frac{P(S)}{P(\sim S)}$$

Where S is the story and F is the fact. The numerator in the likelihood ratio is 1 because the probability of the fact being true given that the entire story is true is 1. The denominator in the likelihood ratio is our quantity of interest.

probability, the less helpful the corroboration is to determine the truthfulness of the child's statement on the material facts. But the corroboration is useless only if the declarant is equally likely to be telling the truth on that point if they are truthful or untruthful on the other points. In our example, the declarant's accuracy about what the killer said tends to show that her relevant testimonial capacities of sincerity, memory, and narration were in good order,<sup>195</sup> and it tends to show that her statement about what the killer looked like is credible.

Corroboration of other facts might run into another problem: the "collateral-matter rule." Under that rule, an opposing party may not introduce extrinsic evidence contradicting a witness (or hearsay declarant<sup>196</sup>) on a collateral matter.<sup>197</sup> Although "the term 'collateral' is notoriously ambiguous,"<sup>198</sup> matters that are *not* collateral are generally those that are directly at issue in the litigation—that could be proved on their own.<sup>199</sup> The basic rationale of the rule is that contradiction on collateral points may waste time and confuse the jury, and while contradiction on collateral points may give the factfinder *some* information about the witness's credibility on material points, it typically does not provide *very much* information.<sup>200</sup> The statement the killer made before killing the victim is sufficiently intertwined with the killing that it would probably not be deemed collateral. But if, instead, both the witness and the declarant reported that just before the killing, a man across the street was whistling "The Girl from Ipanema," that would be probative of the declarant's testimonial capacities, but it would probably be collateral. If the opponent cannot introduce evidence to contradict the declarant on this point, as a matter of fairness, the proponent should not be able to use corroboration

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<sup>195</sup> Her capacity of perception was working with respect to what she heard as well, but that does not tell us about the lighting conditions or any visual obstructions, which bear on her capacity to see the killer.

<sup>196</sup> See FED. R. EVID. 806 (permitting impeachment of a hearsay declarant by the same means as impeachment of a testifying witness).

<sup>197</sup> Frederick C. Moss, *The Sweeping-Claims Exception and the Federal Rules of Evidence*, 1982 DUKE L.J. 61, 62.

<sup>198</sup> Kevin C. McMunigal & Calvin William Sharpe, *Reforming Extrinsic Impeachment*, 33 CONN. L. REV. 363, 364 (2001).

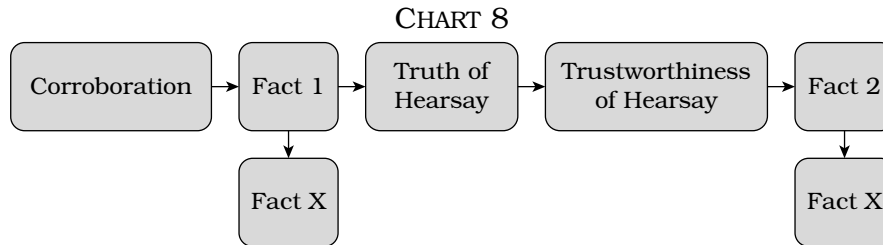
<sup>199</sup> Moss, *supra* note 197, at 65 (citing 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1003 (James H. Chadbourn rev., 1970) and JOHN MACARTHUR MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 67 (1947)). Witness bias is also not considered collateral.

<sup>200</sup> *Id.* at 63–64 (citing *Att'y-Gen. v. Hitchcock*, 154 Eng. Rep. 38, 44 (Exch. Ch. 1847) and 3A WIGMORE, *supra* note 199, at §§ 1001–1002). Another rationale, cited in *Hitchcock*, is unfair surprise to the witness, but that reason does not apply to hearsay.



on the point to get the declarant's statement into evidence, on the theory that it will help the jury evaluate the declarant's trustworthiness. The unproblematic corroboration, then, is limited to facts that walk the line of not favoring one party's case but also not being collateral.

But the more difficult problem with other-fact corroboration surfaces when the proof structure looks as follows:



Here, both Fact 1 and Fact 2 tend to prove some ultimate fact, Fact X, such as the killer's identity.<sup>201</sup> Maybe what the killer said—"Too bad you never got to enjoy your retirement"—is significant because the defendant and the victim had recently argued about the victim's early retirement, so that statement tends to prove the identity of the killer. Still, the level of detail at which the declarant remembers the interaction bears on her credibility. The logic here is not simply: "The corroboration of the killer's identity increases the probability that she's credible, and therefore we have more reason to believe her about the killer's identity." Rather, it's: "The corroboration of the what the killer said (Fact 1), which bears on the killer's identity (Fact X), increases the probability that she's credible, and therefore we have more reason to believe her about the physical description (Fact 2), which also bears on the killer's identity (Fact X)." I contend that it should be possible to break the declarant's statement up this way and use corroboration on one fact in order to prove the declarant's reliability for purposes of weighting another fact. As long as the evidence does not contain the circular component, the factfinder is not guilty of "pre-screening" or "dogmatism." There is no confirmation-bias-type irrationality.<sup>202</sup> Dividing up the probative value of

<sup>201</sup> In Wigmore's terms, Facts 1 and 2 might be "*facta probanda*," propositions to be proved, and Fact X might be an "*interim probandum*," "a proposition to be proved which will support or negate, either directly or indirectly, an ultimate issue as part of a chain of inferences." James L. Kainen, *The Rationalist Tradition at Trial*, 60 *FORDHAM L. REV.* 1085, 1089 n.21 (1992) (book review).

<sup>202</sup> Philosophers Douglas Walton and Chris Reed argue that convergent evidence—multiple pieces of evidence that prove the same point—can often be corroborative—in the sense that one piece of evidence can "boost" the plausibility of

the corroboration this way is almost certainly beyond the cognitive capacity of the jury.<sup>203</sup> But if I am correct, it is not inherently irrational to use corroboration of one fact in a declarant's statement to prove her reliability for purposes of another fact in her statement, even if both facts ultimately prove the same greater point.

#### B. A Workable Rule?

I have spelled out the trouble with using corroboration to determine trustworthiness and discussed the sort of other-fact corroboration that does not implicate that problem. How, then, should a court consider corroboration in determining whether the evidence is sufficiently trustworthy to be admitted? A rule for considering corroboration requires answers to two questions: What corroboration can the court consider, and how much corroboration suffices to admit the evidence?

##### 1. *What Corroboration to Consider*

As for what corroboration the judge can consider, we have seen that corroboration that proves the same material fact as the hearsay generally raises the "structural confirmation bias" problem, whereas other-fact corroboration does not. The court can, therefore, consider only other-fact corroboration.

But what about inadmissible corroboration? The Federal Rules allow courts to consider inadmissible evidence when making admissibility determinations.<sup>204</sup> Inadmissible evidence that corroborates the declarant's statement may give the court information about its trustworthiness, just as admissible evidence could. And inadmissible evidence does not raise the structural confirmation bias problem: the factfinder will not use the evidence, so it is not double counted.

However, in deciding whether to rely on inadmissible evidence, the court should consider *why* the evidence is inadmissible. One possibility is that the evidence has reliability

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another—because the "boost" does not stem from a forbidden chain of reasoning. Instead, the corroboration anticipates and rebuts a potential objection to the evidence, thereby making the evidence stronger. Walton & Reed, *supra* note 114, at 539. I agree that this is possible, per above. However, the central anticipated objection they raise is that a witness statement is inconsistent with other, independent witness statements. *Id.* at 542–43. This does not appear to me to be truly distinct from the forbidden chain of reasoning: inconsistency with other witnesses tends to prove unreliability because it indicates that the witness is incorrect.

<sup>203</sup> Cf. Wittlin, *supra* note 136, at 1340, 1340 n.67 (citing sources supporting the proposition that "actual jurors are far from perfect Bayesians").

<sup>204</sup> FED. R. EVID. 104(a).

problems of its own: it is also hearsay, or perhaps it is insufficiently reliable expert evidence,<sup>205</sup> or it falls under some other rule that excludes unreliable evidence.<sup>206</sup> While some courts and commentators have warned against considering unreliable corroboration,<sup>207</sup> unreliable corroboration can, in fact, be useful. As others like Jonathan Cohen and Richard Eggleston have pointed out, two unreliable witnesses can corroborate each other, as long as they are unreliable for *different reasons*.<sup>208</sup> It is unlikely that two people with independent reliability defects—in Cohen’s example, one has a “shifty demeanour” and one has “bad eyesight”—would come to the same story if it were not true, so if they both testify to the same story, the story is very probably true. By the same token, if a declarant and another excluded piece of evidence both agree on a fact, and if there is no reason to believe they have a common source of unreliability, there is strong reason to believe that the fact is true. If they do have a common source of potential unreliability, however—perhaps one influenced the other—the value of corroboration is correspondingly decreased. I will discuss this more precisely in the next Section.

But there are other, more troubling, reasons that evidence might be inadmissible. Introduction of the evidence might violate a criminal defendant’s rights under the Confrontation Clause or the Fourth or Fifth Amendments, or the evidence might be excluded largely for policy reasons, as character evidence<sup>209</sup> and evidence of subsequent remedial measures<sup>210</sup> are. When excluded evidence is used as a hook to admit another piece of evidence, that excluded evidence affects the trial. Permitting the excluded evidence to have that effect subverts the policy reasons for keeping it out. Rule 104(a) does permit courts to consider evidence that would be excluded under the Rules, save the privilege Rules, so perhaps it is too much to ask courts not to consider character evidence or subsequent remedial measures, if relevant to its inquiry. But if introduction of the evidence would violate the defendant’s constitutional

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<sup>205</sup> See FED. R. EVID. 702.

<sup>206</sup> Perhaps the Original Document Rule, which requires an original writing, recording, or photograph to prove its contents, FED. R. EVID. 1002, could fall into this category.

<sup>207</sup> *E.g.*, Lewis, *supra* note 103, at 329–30 (Confrontation Clause); Marks, *supra* note 33, at 250; R. v. Bradshaw, [2017] 1 S.C.R. 865, 890 (Can.).

<sup>208</sup> L. JONATHAN COHEN, THE PROBABLE AND THE PROVABLE 96 (1977); Sir Richard Eggleston, *The Mathematics of Corroboration*, 1985 CRIM. L. REV. 640, 642.

<sup>209</sup> FED. R. EVID. 404.

<sup>210</sup> FED. R. EVID. 407.

rights, the court should not allow it to prejudice the defendant's case by serving as a hook to bring other hearsay in.<sup>211</sup>

## 2. *How Much Suffices?*

Given the corroboration that the court is permitted to consider, how much corroboration should the court require for the evidence to be admitted? To make this determination, the court will evaluate *how much* the other-fact or inadmissible corroboration increases the estimated trustworthiness of the hearsay. To do so, it will need to consider the extent to which the hearsay and the corroboration are independent from each other.

The effect of two pieces of evidence is greater than the effect of one piece of evidence *only* to the extent that the two pieces of evidence are independent, in the sense that they are not correlated with each other *except* to the degree that they are both correlated with the material fact that they both prove. "Two variables  $x$  and  $y$  are conditionally independent given a third variable  $z$  if, once the value of  $z$  is known, knowing the value of  $y$  provides no additional information about  $x$  (and vice versa)."<sup>212</sup> In other words, conditional independence means the following: Say we have two pieces of evidence, the hearsay and the corroboration, both of which prove the same fact of interest, that the defendant assaulted the victim. The probability of observing either piece of evidence depends *only* on whether the defendant assaulted the victim; it is *not* otherwise correlated with the presence of other piece of evidence.<sup>213</sup> Perhaps the two pieces of evidence are a hearsay statement from one of the defendant's children and in-court testimony from the defendant's other child. Those statements would (almost certainly) *not* be conditionally independent. There are several reasons why we might expect these children's state-

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<sup>211</sup> Cf. DAVID H. KAYE, DAVID E. BERNSTEIN, ANDREW GUTHRIE FERGUSON, MAGGIE WITTLIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* § 5.4.6, at 284–85 (3d ed. 2021) (arguing that when an expert relies on a testimonial basis to form her conclusions, she indirectly transmits that basis, raising constitutional concerns).

<sup>212</sup> Matthew U. Scherer, Allan G. King & Marko J. Mrkonich, *Applying Old Rules to New Tools: Employment Discrimination Law in the Age of Algorithms*, 71 S.C. L. REV. 449, 517 (2019).

<sup>213</sup> See Yeqing Zhou, Yaowu Zhang & Liping Zhu, *A Projective Approach to Conditional Independence Test for Dependent Processes*, 40 J. BUS. & ECON. STAT. 398, 398 (2022), <https://www.tandfonline.com/doi/epub/10.1080/07350015.2020.1826952> [<https://perma.cc/S94G-EJGM>] ("[T]he conditional distribution of  $y$  given  $(x, z)$  varies with the realizations of  $z$  only. In other words,  $x$  is redundant for predicting  $y$  once  $z$  is known.").

ments to be correlated other than the abuse or lack thereof: For example, the children might influence each other's statements, or another adult might influence both children.

Two pieces of evidence combine to increase the probability of some factual proposition to the extent that they are independent, given the fact.<sup>214</sup> If the source of any unreliability in the hearsay is related to the source of any unreliability in the corroborative evidence, the corroborative evidence adds little. For example, if we worry that a witness who identified the defendant in a lineup was influenced by a police officer, evidence of the perpetrator's identity that the police officer gathered *before* the lineup is not very helpful corroboration<sup>215</sup> because it is not independent from the lineup identification. If we worry that jailhouse snitches might fabricate jailhouse confessions to receive favorable treatment, the testimony of two snitches is not as helpful as the testimony of two independent witnesses. Also, if snitches cooperate with each other,<sup>216</sup> perhaps because they *know* that this sort of testimony must be corroborated to be considered,<sup>217</sup> that adds a far greater level of dependence.

<sup>214</sup> We can observe this by looking at Bayes' rule. Say F is the fact of interest, H is the hearsay, and C is the corroboration. The posterior odds of the fact, given both the hearsay and the corroboration are:

$$\frac{P(F|H,C)}{P(\sim F|H,C)} = \frac{P(H,C|F)}{P(H,C|\sim F)} * \frac{P(F)}{P(\sim F)}$$

See Eggleston, *supra* note 208, at 646. (Eggleston includes all of the evidence other than H and C in his equations as an additional variable.) That expression is equivalent to:

$$\frac{P(F|H,C)}{P(\sim F|H,C)} = \frac{P(H|F)*P(C|H,F)}{P(H|\sim F)*P(C|H,\sim F)} * \frac{P(F)}{P(\sim F)}$$

See Daniel Stitt, Vincent Tak Shing Lam, Tim Kok & Ben Bunny Chun Bun Hui, *Joint and Conditional Probabilities*, U.N.S.W. SYDNEY, [http://www.cse.unsw.edu.au/~cs9417ml/Bayes/Pages/Joint\\_Probability.html](http://www.cse.unsw.edu.au/~cs9417ml/Bayes/Pages/Joint_Probability.html) [<https://perma.cc/5TLL-2XQE>] (last modified May 11, 2001). If  $P(H,C|F)$  and  $P(H,C|\sim F)$  equal  $P(H|F)*P(C|H,F)$  and  $P(H|\sim F)*P(C|H,\sim F)$ , respectively, they are conditionally independent. See Judea Pearl, Dan Geiger & Thomas Verma, *Conditional Independence and Its Representations*, 25 *KYBERNETICA* 33, 33 (1989). If  $P(C|H,F)$  and  $P(C|H,\sim F)$  differ from  $P(C|F)$  and  $P(C|\sim F)$ , then the effect of the corroboration will be dampened.

<sup>215</sup> See Koch, *supra* note 58, at 1126; see also Ayling, *supra* note 48, at 1186-87 (deeming a confession corroboration requirement unsatisfactory, in part because of "the ability of the police to suggest corroborating evidence and incorporate it into the suspect's confession").

<sup>216</sup> See Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 *WAKE FOREST L. REV.* 1375, 1402 (2014); REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 18, 30 (1990), <http://grandjury.co.la.ca.us/pdf/Jailhouse%20Informant.pdf> [<https://perma.cc/VAL9-CZSH>].

<sup>217</sup> Cf. *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1124 (9th Cir. 2001) ("Frequently, and because they are aware of the low value of their credibil-

In various contexts, courts and scholars have suggested that corroborating evidence must be independent of the corroborated evidence.<sup>218</sup> “Independent” may simply mean that the corroborating evidence comes from a source other than the declarant.<sup>219</sup> Or “independent” may mean that the corroboration is *entirely* uncorrelated with the hearsay, except to the degree that they are both correlated with what happened. If the latter, a requirement of *complete* conditional independence for corroboration to be *considered* may be too strong. Two pieces of evidence can have *some* dependence and still corroborate each other, albeit to a lesser extent. When a court uses corroboration to evaluate the probability that hearsay is accurate, it should discount the corroboration in accordance with its conditional dependence.

So, once the court understands the added value of the corroboration, how much is enough? This is a difficult question to answer rigorously because the precise mechanism by which “inherent trustworthiness” facilitates accuracy is somewhat ill-defined. It is not simply that reliability is a proxy for accuracy, because courts distinguish reliability from accuracy.<sup>220</sup> Rather, one idea behind the categorical exceptions is that “[i]n any particular case, the opponent’s inability to cross-examine the hearsay declarant causes less concern if the hearsay is believed to be reliable[,]” and “[i]n the longer run of cases, the problems [raised by hearsay] are presumably outweighed if admitting reliable hearsay increases the overall accuracy of trial factfinding.”<sup>221</sup> In essence, then, the court needs sufficient indicia of reliability that its concerns about the inability to cross-examine the declarant are minimal, and it feels confident

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ity, criminals will even go so far as to create corroboration for their lies by recruiting others into the plot . . .”).

<sup>218</sup> *E.g.*, *United States v. Nersesian*, 824 F.2d 1294, 1325 (2d Cir. 1987) (“[D]eclarations of intention or future plans are admissible against a nondeclarant when they are linked with independent evidence that corroborates the declaration.” (citing *United States v. Sperling*, 726 F.2d 69, 74 (2d Cir. 1984)); JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS, No. 334 (2022) (directing jurors to consider the statement of an accomplice only if the statement is supported by other evidence “independent of the accomplice’s” statement); FED. R. EVID. 807 advisory committee’s note to 2019 amendment (“The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any *independent* evidence corroborating the statement.”) (emphasis added); Lewis, *supra* note 103, at 330 (“Corroboration of hearsay significantly addresses the uncertainties that a cross-examination would explore only when . . . the declarant’s knowledge is clearly independent of other potential sources of the information.”).

<sup>219</sup> *See Marks*, *supra* note 33, at 250 n.223 and accompanying text.

<sup>220</sup> *See supra* note 130.

<sup>221</sup> *Swift*, *supra* note 109, at 1342.

that in the long run, admitting evidence of this reliability level will improve accuracy. Those indicia of reliability come from both the circumstances under which the evidence was made and any permissible corroboration. The court should ask itself: Given all of the indicia of reliability, do any significant concerns remain as to the testimonial capacities of the declarant—the declarant's perception, memory, narration, and sincerity—such that cross-examination would be necessary for a reasonable juror to rely on this evidence when coming to a verdict? If so, exclude the evidence. If not, admit it.

### C. Other Theories and Their Implications

The preceding analysis assumes that the hearsay rules serve an accuracy-enhancing function, and they assume that hearsay is trustworthy, and therefore admissible, when it was generated by a process that tends to produce accurate evidence. But while most courts and commentators likely embrace both of those assumptions, neither is uncontroversial. Scholars disagree about the purpose of the rule against hearsay: Some argue that hearsay should be excluded not because it poses truth-seeking problems, but rather because it is wrong to deny the opposing party the opportunity to confront the declarant or allow the jury to hear from the declarant directly.<sup>222</sup> And even scholars who embrace the accuracy-enhancing function disagree about what makes evidence trustworthy, such that it doesn't pose accuracy problems. Some maintain that hearsay should be admitted when the jury has the tools to assess its reliability,<sup>223</sup> while others hold that

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<sup>222</sup> See, e.g., Sevier, *supra* note 117, at 656, 688 (arguing that "a procedural justice rationale would lead to a more coherent and streamlined hearsay rule" and would "likely . . . lead to greater popular legitimacy for the rule"); Swift, *supra* note 109, at 1370 (asserting that hearsay is unfair to the opponent of the evidence because it "deprives opponents of access to the declarant who is the proponent's source of knowledge"); cf. Friedman, *Over-Valuation Concern*, *supra* note 122, at 976-78 (arguing hearsay should rarely be excluded outside of the Confrontation Clause context, and only on procedural grounds); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1373 (1985) (suggesting that the hearsay rule "prevent[s] jurors from basing a verdict on the statement of an out-of-court declarant who might later recant the statement and discredit the verdict"); Nesson & Benkler, *supra* note 104, at 155-56 ("The sin of hearsay is that it robs us of the believability of the surrogate stimulus," which may "render the performance of the trial inadequate to produce the social conviction necessary to reestablish social peace."). Some enumerated hearsay exceptions are based more on notions of fairness than on reliability. See, e.g., FED. R. EVID. 801(d)(2) (statements of a party opponent); 804(b)(6) (forfeiture by wrongdoing).

<sup>223</sup> See Lewis, *supra* note 103, at 317; Edmund M. Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 12 (1937) (paraphrasing Wigmore's view that a statement has

hearsay should be admitted when it is simply very likely to be true.<sup>224</sup>

These different understandings have different implications for the corroboration question. This Section discusses how the preceding analysis changes under these various theories.

### 1. *Non-Truth-Seeking Justifications*

Several commentators have defended the rule against hearsay, at least in part, on grounds other than accuracy. They argue that the problem with hearsay is that it deprives the opponent of the opportunity to confront and cross-examine the declarant, which is both unfair to the opponent and unseemly in the eyes of the public.<sup>225</sup> For example, Justin Sevier has recently argued that a “procedural justice” rationale for the hearsay rule—one that “focuses on the dignity interests of litigants who face their accusers in court” and the “perceived unseemliness” of introducing evidence against them without that dignity<sup>226</sup>—is theoretically superior to an accuracy rationale and is more likely to generate “popular acceptance and perceived legitimacy of the hearsay rule.”<sup>227</sup> He suggests that rule makers should reevaluate reliability-based hearsay exceptions.<sup>228</sup>

If the very introduction of hearsay imposes a fairness or legitimacy harm, a corroboration admissibility rule makes little sense. The presence of a corroborating witness other than the declarant does not substitute for the missing witness: the party still experiences the indignity of having evidence introduced against him without the opportunity to confront and cross-examine *that* declarant.

However, if the harm of hearsay is that a party has no opportunity to confront *any* witness asserting the facts in the

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guarantees of trustworthiness when “the circumstances are such that the jury may make an intelligent appraisal of the value of the testimony”); *cf.* Swift, *supra* note 109, at 1350–51 (“The operational theory, on the other hand, claims that accuracy is maximized by the trier’s ability to apply its own generalizations about reality to determine the probative value of evidence.”).

<sup>224</sup> See *Idaho v. Wright*, 497 U.S. 805, 828–29 (1990) (Kennedy, J., dissenting) (noting that most people use corroboration to determine whether a statement is “trustworthy,” because if physical evidence corroborates a child’s statement, “we are more likely to believe that what the child says is true”); Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. PA. L. REV. 1171, 1234 (2002) (criticizing the “trustworthiness” standard but suggesting definitions relying on the likelihood of truth).

<sup>225</sup> See sources cited *supra* note 222.

<sup>226</sup> Sevier, *supra* note 222, at 655.

<sup>227</sup> *Id.* at 664.

<sup>228</sup> See *id.* at 689–90.



hearsay, corroboration may cure that defect. Nesson and Benkler—who contend that hearsay undermines public confidence in the *verdict* by presenting a witness too far removed from the action—argue that admissible corroboration can “cure the rhetorical deficit of hearsay” by giving a criminal defendant the opportunity to test the corroborating evidence.<sup>229</sup> The defendant may not be able to cross-examine the declarant, but by testing the corroborating evidence, the defendant puts the substance of the hearsay to the test in a sufficiently similar way.<sup>230</sup> Under this theory, corroboration has some value.

But most commentators agree that the rule against hearsay serves a truth-seeking function. The next two sections address alternative theories of what it means for evidence to be “trustworthy” such that it does not raise truth-seeking concerns.

## 2. *Truth-Seeking: Juror Accessibility*

If the problem with hearsay is the jury’s<sup>231</sup> inability to assign the correct probative value to the hearsay, that concern is mitigated when jurors have some substitute for cross-examination that allows them to correctly evaluate the hearsay. Several commentators have suggested that hearsay should be admitted *when the factfinder has the tools to evaluate its reliability*.<sup>232</sup> And in Canada, courts may admit hearsay if its proponent

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<sup>229</sup> Nesson & Benkler, *supra* note 104, at 164. Their article, written before *Crawford v. Washington*, 541 U.S. 36 (2004), addresses hearsay under the Confrontation Clause, not the rules that apply in both civil and criminal cases.

<sup>230</sup> Nesson & Benkler, *supra* note 104, at 169–70. Nesson and Benkler argue for a corroboration *sufficiency* rule, and would also require that the hearsay have an adequate foundation for it to be admitted. *Id.* at 173. If the concern were, instead, that a *litigant* is harmed by the introduction of hearsay without the opportunity to cross-examine some equivalent witness, a strict admissibility rule would be the better choice: The court should ensure that the litigant will not be accused by an out-of-court declarant without either a past or assured future opportunity to cross-examine a witness providing the same information. If the proponent of the hearsay cannot ensure that, and if introduction of the hearsay would otherwise be unfair to the litigant, the court should exclude the hearsay.

<sup>231</sup> I assume, throughout this analysis, that the factfinder is a jury. Much of the same argument applies if the factfinder is a judge, but because judges often consider evidence that is, in theory, inadmissible, the line between exclusion and weight is thinner in their case.

<sup>232</sup> See, e.g., Lewis, *supra* note 103, at 317; Morgan, *supra* note 223, at 12; Mary Morton, Note, *The Hearsay Rule and Epistemological Suicide*, 74 GEO. L.J. 1301, 1307 (1986) (“[P]erhaps the proper focus in the area of hearsay is not reliability but the means of determining how much weight should be accorded any hearsay statement.”); Swift, *supra* note 109, at 1350–51, 1361–67 (discussing the “operational theory” of accuracy and arguing that it should underlie the rules of evidence).

establishes “procedural reliability,” meaning “its truth and accuracy can . . . be sufficiently tested.”<sup>233</sup>

Commentators who subscribe to this theory of trustworthiness tend to maintain that corroboration does not help the jury assess the probative value of the hearsay statement.<sup>234</sup> That includes the Canadian courts, which deem corroboration helpful to the question of “substantive reliability,” not “procedural reliability.”<sup>235</sup>

But doesn't corroboration tell jurors something about the reliability of evidence, with corroborated evidence meriting more weight and contradicted evidence meriting less? Yes, but we've already seen the problem with this logic. The jurors are in the same position as Archimedes,<sup>236</sup> using an instrument of indeterminate reliability to provide evidence of a fact of interest. Like Archimedes, they would deviate from rationality by using the corroboration to evaluate the weight of the evidence. It would be a mistake, then, to use corroboration as a factor in the hearsay admissibility determination on the theory that, as a general matter, corroboration can help jurors evaluate the trustworthiness of the hearsay. It can't.

Or at least it shouldn't. Jurors almost certainly *will* use corroboration in ways that depart from Bayesian updating. For example, Dan Simon has demonstrated that jurors engage in what he calls “coherence-based reasoning.”<sup>237</sup> When factfinders encounter a complex decision task, in which variables point in multiple directions, those factfinders reconfigure their mental model of the task until it reaches a point of maximum coherence.<sup>238</sup> This involves a bidirectional process, where the evidence influences the factfinder's conclusion, but the tentative conclusion also affects the factfinder's understanding of the evidence. In the case of corroboration, the corroborating evidence would affect the jurors' tentative conclusions, which in turn would affect how the jurors view the hearsay. Other empirical research also indicates that jurors use corroboration to assess credibility. In one study by John

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<sup>233</sup> R. v. Bradshaw, [2017] 1 S.C.R. 865, 880–81 (Can.); R. v. Khelawon, [2006] 2 S.C.R. 787, 821 (Can.); see also Hamish Stewart, *The Future of the Principled Approach to Hearsay*, 23 CAN. CRIM. L. REV. 183, 187 (2018).

<sup>234</sup> See Swift, *supra* note 109, at 1425 (“Admitting hearsay under the corroboration test does not satisfy foundation fact policy.”).

<sup>235</sup> See *Bradshaw*, 1 S.C.R. at 885.

<sup>236</sup> See *supra* Part II.A.1.

<sup>237</sup> Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 512–13 (2004).

<sup>238</sup> *Id.* at 521–22.

Myers and colleagues, jurors in real child abuse trials reported relying on corroborating evidence—medical evidence of abuse, the child's behavior after the incident—to determine whether or not to believe the child witness's pretrial statements.<sup>239</sup> In another, mock jurors were more likely to convict in child abuse cases with corroboration, but they attributed the decision to convict to the child's testimony rather than the presence of corroboration, suggesting the corroboration may have caused them to put increased reliance on the child's testimony.<sup>240</sup>

Although jurors may in fact give corroborated evidence more weight, courts should not endorse this use of corroboration by determining that it helps jurors assess the value of the corroborated evidence. Jurors who give corroborated evidence more weight deviate from rational fact-finding. If "trustworthiness" means that the jurors can assess the probative value of the evidence, corroboration should not be a consideration in whether the evidence is "trustworthy."

As with the "inherent trustworthiness" understanding, jurors can use corroboration of "other facts" to evaluate the trustworthiness of the hearsay, so a corroboration rule may be of *some* use. But implementing a corroboration rule under a "juror accessibility" understanding would differ from the rule described above in key ways.

First, while courts operating under an "inherent trustworthiness" rationale could consider inadmissible corroboration,<sup>241</sup> under this understanding of trustworthiness, the corroborating evidence would need to be admissible. Inadmissible evidence would not help a jury evaluate the trustworthiness of the hearsay.

Second, while corroboration rules have typically (and unsurprisingly) required corroboration, under this understanding of trustworthiness, contradiction is as valuable as corroboration. If the idea is that jurors can use the corroborating evidence to more *accurately* determine whether the hearsay is

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<sup>239</sup> See John E.B. Myers, Allison D. Redlich, Gail S. Goodman, Lori P. Prizmich & Edward Imwinkelried, *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCH. PUB. POLY & L. 388, 409 tbl.10 (1999) (reporting that 32% of participants considered medical evidence and 37% considered the child's behavior important to believing the child's statement).

<sup>240</sup> L. Matthew Duggan III, et al., *The Credibility of Children as Witnesses in a Simulated Child Sex Abuse Trial*, in PERSPECTIVES ON CHILDREN'S TESTIMONY 71, 93 (S. J. Ceci, D.F. Ross & M.P. Toglia, eds., 1989) ("The effect of corroboration may be to add weight to the alleged victim's testimony, without the juror's being aware of it. Other explanations are possible.").

<sup>241</sup> FED. R. EVID. 104(a). Courts may not consider evidence inadmissible under the privilege rules. *Id.*

true, then evidence tending to prove that the hearsay is *not* true also helps in this inquiry. Evidence that the killer said something different—or nothing at all—would give the jury a reason to deem the declarant’s description less credible. This aligns with the idea of corroboration as a substitute for cross-examination: cross-examination does not ensure that jurors can rely on all evidence presented to them; rather, it exposes defects in evidence and allows them to give it proper weight.<sup>242</sup> In fact, if our concern about hearsay is that it has flaws, and that jurors are likely to *overestimate* its value, then *only* contradiction is helpful under this model: jurors will be less likely to give the hearsay too much weight if they see that parts of it are contradicted by other evidence. Of course, rules that require courts to consider “corroboration” do not invite this reasoning, and courts will exclude evidence, not admit it, because it is contradicted.<sup>243</sup>

Third, the court will have to determine when the corroboration (or contradiction) is *sufficient* for the hearsay to be admissible. There are a couple of ways for courts to approach this question. If we believe that hearsay should be admitted only when the jury is able to do *as good* a job of evaluating its accuracy as it would with cross-examination,<sup>244</sup> the threshold will be high. The court would need to consider all the information the jury will hear about the circumstances under which the declarant observed the events and made the statement, along with the corroboration or contradiction, and decide whether the jury would have remaining questions that cross-examination could answer.

But if we are concerned about rational truth-seeking, requiring that the jury be *as sure* about the value of the hearsay as they would be after cross-examination will exclude too much evidence. Two alternatives may be preferable.

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<sup>242</sup> See Morton, *supra* note 232, at 1307.

<sup>243</sup> See, e.g., *Arreola v. Aguilar*, No. 4:19-CV-5 (CDL), 2021 WL 2403446, at \*1 (M.D. Ga. June 11, 2021) (“Tarvin’s statements do not satisfy the stringent Rule 807 requirements. Defendants correctly note that several of Tarvin’s assertions—such as his contention that the officers used tasers—are in fact just plain wrong and contradicted by the undisputed evidence.”).

<sup>244</sup> *Cf. R. v. Bradshaw*, [2017] 1 S.C.R. 865, 885 (Can.) (“[I]n assessing threshold reliability, the trial judge’s preoccupation is whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process.”); Lewis, *supra* note 103, at 317 (“The jury will have a ‘satisfactory basis for evaluating the truth’ of the hearsay only when it appears that cross-examination would be unnecessary to a proper assessment of its weight.”) (on the Confrontation Clause).

The first alternative is to enable the jury to estimate the reliability of the evidence with sufficient precision that they have a strong basis for the weight they assign the evidence. If the goal of the trial is “rational truth-seeking,”<sup>245</sup> this alternative would focus on the “rational” part: we are concerned not simply that the jury will overestimate the hearsay, but rather that they will not have a firm enough basis for assigning value to it. As Alex Stein might say, hearsay has too low a “signal-to-noise ratio,” and corroboration can remedy that.<sup>246</sup> Under Stein’s theory, evidence should be admissible when the range of probabilities one could reasonably attach to it is significantly smaller than the strength of the evidence itself.<sup>247</sup> Implementing that theory, corroboration or contradiction would need to be strong enough that the jury’s estimates of the evidence’s value would cluster tightly around its true value.

The second alternative focuses more on the “truth-seeking” part of “rational truth-seeking.” This alternative would admit evidence that makes an accurate verdict more likely and exclude evidence that makes an accurate verdict less likely.<sup>248</sup> Take a civil case, where the plaintiff’s burden is proof by a preponderance of the evidence. The plaintiff wants to admit hearsay, but the court is concerned that the jury will overestimate it. Now make an additional assumption, which I will revisit in a later section: the judge does not want to usurp the jury’s role by deciding whether the plaintiff should win or lose *in this particular case*. Instead, he wants only to best enable the jury to come to the correct decision, given this hearsay. The case could be modeled as Figure 1 below. The independent variable and the solid line are the strength of the case without the hearsay evidence: the probability that the plaintiff’s story is true, considering all of the evidence in the case except for the hearsay. The long-dash line is the true strength of the plaintiff’s case *with* the hearsay. Here, I assume that the hearsay has a likelihood ratio of 2. The dotted and short-dash lines show the *perceived* posterior probabilities of jurors who, respectively, do a bad and pretty good job estimating the value of

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<sup>245</sup> David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 2, 4 (1986).

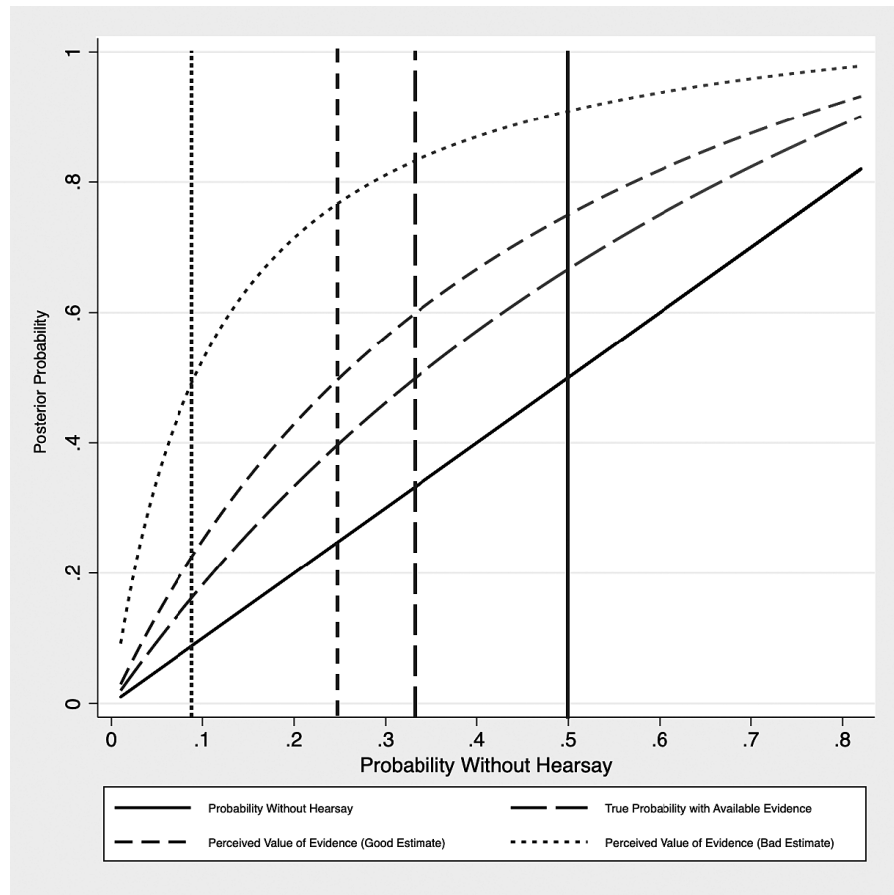
<sup>246</sup> Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423, 424, 427, 454 (2015).

<sup>247</sup> Stein suggests the legal system should set a minimum signal-to-noise ratio of 2. *Id.* at 436.

<sup>248</sup> Generally, evidence should be excluded only if its probative value is *substantially* outweighed by its downsides, FED. R. EVID. 403, but for hearsay, which is inadmissible unless the rules provide otherwise, a more even-handed analysis may be appropriate.

the hearsay. The dotted-line jurors perceive the hearsay as having a likelihood ratio of 10, whereas the short-dash-line jurors perceive the hearsay as having a likelihood ratio of 3.<sup>249</sup>

FIGURE 1



A court will probably wish to exclude the hearsay if jurors are going to behave like the dotted-line jurors. With the hearsay evidence, those jurors will believe the plaintiff has proved its case by a preponderance when the plaintiff has actually proven its case only to a probability of .15.<sup>250</sup> For all cases between .15 and .5,<sup>251</sup> where the plaintiff should lose, this jury will find in the plaintiff's favor. If the hearsay is excluded, however, the jury will "err" only for cases between .5 and .67,<sup>252</sup>

<sup>249</sup> For simplicity, I also assume that the jury has correctly estimated the value of the rest of the evidence in the case, and that with cross-examination, the jury would correctly estimate the value of the hearsay evidence.

<sup>250</sup> See the vertical dotted line at left.

<sup>251</sup> See the vertical long-dash line.

<sup>252</sup> See the vertical solid line.

at which point even a jury without the hearsay would conclude that the plaintiff has proved its case by a preponderance. If the jurors behave like the short-dash-line jurors, however, they will incorrectly believe the plaintiff has proved its case by a preponderance between the values of .4<sup>253</sup> and .5. Whereas if the evidence is excluded, they, too, will “err” for cases between .5 and .67.

Assuming a symmetric, normal distribution of cases around .5,<sup>254</sup> admitting the evidence for the short-dash-line jurors will cause them to err in fewer cases than excluding the evidence will. For the dotted-line jurors, however, admitting the evidence will cause them to err in more cases than excluding the evidence. An accuracy-focused court should admit the hearsay if it believes the jury will behave more like the short-dash-line jurors and exclude it if they will behave more like the dotted-line jurors: the judge should admit the evidence if he believes the jurors will appreciate its value sufficiently that they will err more if the evidence is excluded than if it is admitted.

This is a difficult model to operationalize. The court may have a difficult time estimating both the strength of the hearsay evidence and what jurors will do with it. But it suggests two heuristics courts might keep in mind: First, if the hearsay itself is very valuable, courts should admit it more readily, because overestimation does less damage than exclusion. And second, courts should not take the position that *any* overestimation is grounds for exclusion. If the jury can do a pretty good job of assessing the evidence’s probative value—considering all the evidence they have, including any contradiction—it will likely help more than hurt.

### 3. *Truth-Seeking: Probably True*

Another understanding of “trustworthiness” is that evidence is trustworthy when it is very probably true. Justice

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<sup>253</sup> See the vertical short-dash line.

<sup>254</sup> Cf. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). Priest and Klein model litigation and settlement, deriving the famous result that “there will be a tendency toward a plaintiff’s success rate in litigated cases of 50 percent.” *Id.* at 19. In civil cases, that would mean the probability of the plaintiff’s set of facts tends toward 50%. The success rate approaches 50 percent when the parties can estimate the probability of plaintiff victory with low error. *Id.* at 18. The uncertainty in whether the hearsay will be admitted suggests the parties’ estimation errors will not be vanishingly small. Still, I see no reason that case strength will systematically tend to favor the plaintiff or the defendant, so for purposes of this model, I suggest a symmetrical distribution.

Kennedy appeared to endorse this understanding in *Wright* when he noted that corroboration is “one of the best ways to determine whether what someone says is trustworthy,” because if there is physical evidence corroborating a child’s statement, for example, “we are more likely to believe that what the child says is true.”<sup>255</sup> Advocating for the corroboration amendment to Rule 807, Capra appeared to emphasize this understanding, writing: “The ultimate inquiry is whether the declarant is telling the truth, and reference to corroborating evidence is a typical and time-tested means of helping to establish that a person is telling the truth.”<sup>256</sup> Under this understanding, hearsay is not admitted because it is *intrinsically* trustworthy but rather just because it is likely to accurately represent what happened. And while more commentators appear to understand “trustworthiness” to mean something like “inherent trustworthiness,”<sup>257</sup> if we take a central goal of the Rules of Evidence to be truth-seeking,<sup>258</sup> evaluating the truth value of evidence before admitting it is one way to get there.

This understanding of “trustworthiness,” which suggests that courts should admit evidence that points the jury to the correct answer, is the most conducive to corroboration rules. Corroboration increases the probability that a fact of interest is true, to the extent that it is independent of the hearsay it’s corroborating. And under the understanding of trustworthiness addressed here, the court admits hearsay when it is sufficiently probable that the hearsay is accurate. So, we could say: corroborated evidence is more likely to be true; evidence should be admitted when it is likely to be true, so corroboration should be a factor in admissibility.

The “structural confirmation bias” problem is still present. In many ways, this understanding of trustworthiness raises the same problem as the “intrinsic trustworthiness” understanding. Instead of a chain of reasoning that looks like this:

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<sup>255</sup> *Idaho v. Wright*, 497 U.S. 805, 828–29 (Kennedy, J., dissenting).

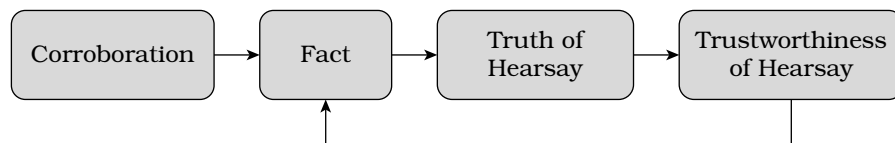
<sup>256</sup> Capra, *supra* note 12, at 1584; *see also* Friedman & McCormack, *supra* note 224, at 1234.

<sup>257</sup> *See, e.g.*, Koch, *supra* note 58, at 1124 (“‘Reliability’ clearly refers to the reliability of the identification testimony itself, and not to the reliability of the overall outcome . . . .”); Shaw, *supra* note 109, at 34 (distinguishing between reliability and accuracy); Wildenthal, *supra* note 108, at 1372 n.265 (distinguishing between trustworthiness and truth).

<sup>258</sup> *See* FED. R. EVID. 102 (commanding that the Rules be interpreted “to the end of ascertaining the truth and securing a just determination”).

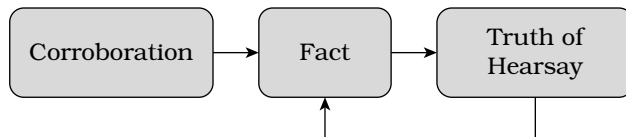


CHART 9



We have a chain of reasoning that looks like this:

CHART 10



Stronger cases get more evidence; weaker cases don't.

But this understanding of trustworthiness—"likely to be true"—suggests another way of understanding of why we admit evidence, which could obviate this concern. Perhaps we should admit evidence not to give the jury the best *ability* to rationally evaluate the available evidence and come to a reasonable result, but rather to give this evidence to the jury only when the *court* deems it acceptable or desirable for a jury to find the fact that the hearsay tends to prove. In other words, we may want the judge to permit the jury to hear the hearsay only when a reasonable jury could or should resolve the factual dispute in favor of the proponent.

Under this understanding, the court would consider both the hearsay's indicia of trustworthiness and the strength of the corroborating evidence and decide whether the totality of evidence is strong enough that a jury could permissibly find or should find in favor of the proponent. This would target a central concern with unreliable evidence: that the jury will decide a case based on evidence too shaky to support their verdict. By excluding evidence when a decision in the proponent's favor would be improper, the court guards against this threat.

Under one version of a "probably true" rule, the judge would determine whether the evidence proves the fact to the appropriate level of proof and admit the evidence only if he thinks the jury *should* find in the proponent's favor. There is something tempting about this idea: if we truly want the "trustworthiness" requirement to function as a "safe harbor,"<sup>259</sup> so the jury's overvaluation of the hearsay evidence cannot cause error, this might be the way to go. And this resembles a more fine-grained and invasive version of the admit-prejudicial-evi-

<sup>259</sup> See Friedman, *Truth and Its Rivals*, *supra* note 122, at 554.

dence-in-close-cases approach to Rule 403 discussed above.<sup>260</sup> But this method usurps the factfinding role of the jury.<sup>261</sup> It substitutes the court's judgment about the quality of the case for the jury's.<sup>262</sup> The judge's role is to serve as a gatekeeper of evidence in order to improve juror decision-making; not to use the jury as its puppet.

Under a less invasive rule, the court would exclude the evidence where the proponent has the burden of proof if the court deems the evidence on that point insufficient to meet the proponent's burden. A court could exclude evidence where the proponent does *not* have the burden of proof if it deems the evidence insufficient to *negate* the plaintiff's evidence. If jurors *do*, in fact, systematically overweigh hearsay, this approach could bias the case in favor of the proponent of the hearsay, because it puts a thumb on the scale of admissibility. This is a somewhat serious concern in criminal cases. To mitigate this concern, the court should take the sufficiency evaluation seriously: it should scrutinize prosecutor evidence and determine whether it suffices to prove a material fact beyond a reasonable doubt; the court should not simply admit all corroborated hearsay.

This method of using corroboration may avoid the double-counting concern and target a problem with unreliable evidence. And I would not say that it is *wrong* from a truth-seeking perspective. But it does deviate somewhat from how we usually think of *admissibility* determinations.<sup>263</sup> Instead, it closely replicates another function of the court: deciding motions for judgment as a matter of law. In the next Part, I argue that, where possible, courts should consider corroboration in determining the sufficiency of the evidence, not its admissibility.

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<sup>260</sup> See *supra* text accompanying notes 182–189.

<sup>261</sup> See Friedman, *Truth and Its Rivals*, *supra* note 122, at 552; Mnookin, *supra* note 46, at 1537 (“Given that the judge’s role is to determine what matters are fit for the jury to hear rather than to assess the evidentiary merits herself, an aggressively holistic approach to evaluating evidence could well be seen as an invasion of the province of the jury.”); Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1887–88 (2015).

<sup>262</sup> Hunt and Rankin have criticized the Canadian rule for this reason. See Hunt & Rankin, *supra* note 128, at 75.

<sup>263</sup> See Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 337 (1999) (noting the “traditional and proper practice” is to “see[] the admissibility of evidence as a question quite distinct from the sufficiency of evidence to meet a plaintiff’s burden of proof”); see also *infra* text accompanying notes 287–291.

## III

## BUILDING A BETTER CORROBORATION RULE

The structural confirmation bias problem, highlighted above, limits the usefulness of corroboration rules under predominant theories of evidence. So, what should courts and rule makers do when a category of evidence is critically important but also presents troubling reliability concerns? In this Part, I argue that corroboration can still be useful, but corroboration rules should be styled as rules of sufficiency, not admissibility, where possible. Of course, not every type of evidence *should* have a corroboration rule attached: only evidence that courts or legislators decide is legally insufficient to serve as the basis of a verdict on its own.

However, if the evidence is offered by the party without the burden of proof, courts will rarely have occasion to find the party's evidence insufficient as a matter of law. So, where the rule will apply to evidence that may be introduced by either party, admissibility rules are the only real corroboration-rule possibility. Using the discussion above, I advise judges on how to apply a corroboration rule like the recently amended residual exception: use only corroboration that doesn't raise the confirmation bias problem.

## A. Sufficiency Rules

1. *Sufficiency Rules in the Law*

Corroboration sufficiency rules pre-date corroboration admissibility rules. For one, the Torah provides that the testimony of a single witness is insufficient to impose the death penalty on a murderer, and both the Old and New Testaments provide that other wrongs may be proved by no fewer than two or three witnesses.<sup>264</sup> By the 4th Century C.E., Roman law provided that a single witness was insufficient to prove any point.<sup>265</sup>

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<sup>264</sup> See John Henry Wigmore, *Required Numbers of Witnesses: A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83, 84–85, 85 n.1 (1901) (citing, *inter alia*, *Deuteronomy* 17:6, 19:15; *Matthew* 18:16; *John* 8:17).

<sup>265</sup> *Id.* at 84. This rule was later adopted into Continental civil law, *id.*, and was well-known in England as the jury system developed there. 5 WIGMORE, *supra* note 117, at § 1364, at 16. Witnesses became a regular feature of English trials in the very late 15th Century, *id.* at 14–15, and courts and lawyers began to debate sufficiency requirements: how many witnesses were needed to convict a man? *Id.* at 16. These debates, however, never calcified into general numerical sufficiency requirements. *Id.*

A two-witness requirement did form for treason and perjury. *Id.* According to Wigmore, a corroboration admissibility rule emerged from these sufficiency con-

Several corroboration sufficiency rules have persisted in the modern era—some specified by the offense, others by the type of evidence.<sup>266</sup> The most famous of these comes to us directly from an earlier era: Article III of the Constitution specifies, “No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”<sup>267</sup> This two-witness requirement, which derived from English law,<sup>268</sup> reflects not only the seriousness of the offense, but also the potential *unreliability* of treason witnesses, in light of government pressure.<sup>269</sup>

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cerns. He writes that in the late 17th Century, courts developed the general rule against hearsay; but while they excluded hearsay generally, they *did* admit it only for the purpose of corroborating live testimony. *Id.* at 17–19. Hearsay was, in itself, an insufficient basis for a criminal conviction, so courts would exclude it as independent evidence; but hearsay that “merely supplements other good evidence already in” was admissible. *Id.* at 20. Wigmore’s timeline has been challenged by several more recent scholars, who argue that a firm exclusionary rule did not develop until the mid-18th Century or later. See David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L. REV. 1899, 1926–27 (2015) (discussing the debate); T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 531–37 (1999) (providing an overview of the history); John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1171–72 (1996). However, there is additional support for hearsay being disfavored except as corroboration in the early 1700s: Gilbert’s influential 18th Century treatise advises that “a mere hearsay is no Evidence,” as the declarant was not under oath. See 2 LORD CHIEF BARON GILBERT, *THE LAW OF EVIDENCE* 889 (Capel Lofft rev., 1791). (Gilbert appears to have been suggesting that hearsay evidence should carry no weight—not that it should be excluded.) But Gilbert confirms that hearsay had a proper corroboratory use: a witness’s prior consistent statement could be introduced to demonstrate a witness’s consistency and, therefore, credibility. *Id.* at 890 (“[Hearsay] may [be allowed] in *Corroboration* of a Witness’s Testimony: to shew that he affirmed the *same* Thing on *other* occasions, and that the Witness is still consistent with himself; for such Evidence is only in support of the Witness that gives his Testimony upon Oath.”).

<sup>266</sup> John Leubsdorf, *Fringes: Evidence Law Beyond the Federal Rules*, 51 IND. L. REV. 613, 616 (2018).

<sup>267</sup> U.S. CONST. art. III, § 3, cl. 1.

<sup>268</sup> As Leubsdorf notes, the constitutional provision derived from the English Treason Act of 1695. See Treason Act 1695, 7 & 8 Will. 3 c. 3, § 2, <https://www.british-history.ac.uk/statutes-realm/vol7/pp6-7> [<https://perma.cc/N9AU-GLUP>]. This Act, in turn, restored the requirement previously enacted in the Treason Act 1547, 1 Edw. 6 c. 12, § 22. England has since repealed the two-witness requirement. See Treason Act 1945, 8 & 9 Geo. 6 c. 44, [https://www.legislation.gov.uk/ukpga/1945/44/pdfs/ukpga\\_19450044\\_en.pdf](https://www.legislation.gov.uk/ukpga/1945/44/pdfs/ukpga_19450044_en.pdf) [<https://perma.cc/T5E5-9D3T>].

<sup>269</sup> See Leubsdorf, *supra* note 266, at 617. Benjamin Franklin, advocating for the “overt act” requirement, noted that “prosecutions for treason were generally virulent; and perjury too easily made use of against innocence.” Notes of James Madison (Aug. 20, 1787), in *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 348 (Max Ferrand ed., 1911); James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99, 113 (1983).

Both federal and state courts have long held that a perjury conviction cannot be based on the testimony of a single witness; either a second witness or other evidence must corroborate the testimony.<sup>270</sup> The traditional rationale for the rule is not one based in unreliability; rather, it exists “to prevent a defendant from being convicted on the strength of his oath versus that of another.”<sup>271</sup> However, the Supreme Court has also recognized that the rule may “protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions,”<sup>272</sup> suggesting a certain suspicion of perjury testimony.

Although the rule did not exist at common law,<sup>273</sup> up until the 1970s, many states required corroboration of a victim’s<sup>274</sup> testimony before a defendant could be convicted of rape.<sup>275</sup> States varied in the amount of corroboration required, as well as which elements of the crime had to be corroborated.<sup>276</sup> A central justification for this requirement was the supposed unreliability of rape complainants<sup>277</sup>—it was believed that false accusations were disproportionately high for rape relative to other crimes.<sup>278</sup> The idea was that women would falsely report a rape after feeling ashamed of a consensual sexual encounter, or out of malice, or perhaps a woman would be confused about the identity of her attacker, or she might have fantasized the

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<sup>270</sup> See *Hammer v. United States*, 271 U.S. 620, 626 (1926) (“The application of that rule in federal and state courts is well nigh universal.”); Annotation, *Corroboration by Circumstantial Evidence of Testimony of Single Witness in Prosecution for Perjury*, 111 A.L.R. 825 (2019) (collecting cases).

<sup>271</sup> Linda F. Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. Tol. L. Rev. 397, 409 (2003); see also *Smith v. State*, 443 A.2d 985, 992 (Md. App. 1982) (“If only one person’s testimony was offered against the accused, the situation would present oath against oath, or a ‘draw.’”).

<sup>272</sup> *Weiler v. United States*, 323 U.S. 606, 609 (1945).

<sup>273</sup> See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1137 (1986).

<sup>274</sup> I follow Federal Rule of Evidence 412(d), which defines “victim” to include an alleged victim.

<sup>275</sup> See Irving Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 40 FORDHAM L. REV. 263, 265 nn.8–9 (1971) (listing statutes and decisions, respectively).

<sup>276</sup> Donald J. Friedman, Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1368–70 (1972).

<sup>277</sup> See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 957 (2004) (discussing a 1904 Georgia Supreme Court decision that imposed a corroboration requirement out of concern about false accusers).

<sup>278</sup> Friedman, *supra* note 276, at 1373, 1373 n.55. The requirement was also justified by a heightened risk of unfair prejudice in these cases, and by the difficulty of disproving rape. *Id.* at 1373.

attack.<sup>279</sup> After decades of criticism, rape reform legislation in the 1970s largely eliminated these rules.<sup>280</sup>

A corroboration sufficiency requirement may also be based on the type of evidence presented, as opposed to the crime charged.<sup>281</sup> In many states, a statement from the defendant's accomplice is insufficient to support a conviction.<sup>282</sup> Reliability problems underlie this requirement. An accomplice may provide a self-serving account of the events at issue,<sup>283</sup> one that maximizes the defendant's involvement at the expense of his own or curries favor with prosecutors. He may also have enough information to make the account believable.<sup>284</sup> A corroboration sufficiency rule establishes that this troublesome, influential testimony cannot form the sole basis of a conviction.

## 2. *Reasons to Prefer Sufficiency Rules*

I submit that ideally, corroboration rules should be rules of sufficiency, not admissibility. Corroboration should not determine whether evidence is admitted but only whether it is a sufficient basis for a verdict in favor of the proponent. In making this argument, I agree with other commentators who've suggested the same or similar,<sup>285</sup> or who've argued that corrob-

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<sup>279</sup> See *id.* at 1373, 1376; Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967); but see Estrich, *supra* note 273, at 1137–38 (arguing that the justification is that lack of consent is a unique element of an offense).

<sup>280</sup> See Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1859 n.12 (2008); Anderson, *supra* note 277, at 949. The Model Penal Code draft reports that “[t]hirteen states maintain limited corroboration provisions,” although these apply only under certain circumstances. MODEL PENAL CODE: SEXUAL ASSAULT & RELATED OFFENSES DISCUSSION DRAFT NO. 2 § 213.10 cmt. at 168–69 (AM. L. INST., Discussion Draft No. 2, 2015). The current Model Penal Code still includes a corroboration requirement, although the draft would eliminate it. See *id.*; Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 214 (2003).

<sup>281</sup> I will discuss the limitation on uncorroborated confession testimony as an admissibility rule, although it has taken both admissibility and sufficiency forms.

<sup>282</sup> See Leubsdorf, *supra* note 266, at 619; Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1222 (2007); Robert J. Norris, Catherine L. Bonventre, Allison D. Redlich & James R. Acker, “*Than that One Innocent Suffer*”: *Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1348–49, 1349 n.330 (2011) (collecting statutes and state cases). Norris et al. suggest these statutes are admissibility rules, but they are all phrased in terms of sufficiency—what is required for a conviction. The caselaw suggests this is how they are applied, as well. See, e.g., *State v. Thoresen*, 921 N.W.2d 547, 551 (Minn. 2019) (analyzing sufficiency); *Goodwin v. State*, 644 So.2d 1269, 1274–75 (Ala. Crim. App. 1993) (same).

<sup>283</sup> See Stein, *supra* note 246, at 453.

<sup>284</sup> See *id.*

<sup>285</sup> See, e.g., Friedman, *supra* note 122, at 970 (opining that granting judgment as a matter of law is preferable to exclusion); Nesson & Benkler, *supra* note

oration is relevant to the “harmless error” inquiry instead of the admissibility inquiry.<sup>286</sup>

Sufficiency rules are preferable to admissibility rules in this context for several reasons. First, corroboration admissibility rules run into the “structural confirmation bias” problem, limiting the type of corroboration that courts can reasonably consider and thereby limiting the usefulness of these rules.

The central way around this—discussed in the context of the “probably true” understanding of trustworthiness—was to take a different view of the role of admissibility determinations. Instead of helping jurors to best estimate the likelihood that one party’s story is true, admissibility determinations were explicitly based on the court’s view of the overall quality of the party’s case: the court admitted the evidence if it thought a reasonable jury could find the evidence on that point sufficient.

While some may reasonably disagree, I maintain that this is the wrong way to think about admitting evidence. Scholars debate the extent to which admissibility determinations should be made atomistically—without considering the evidentiary record as a whole—or holistically—with full recognition of the other evidence in the case.<sup>287</sup> And, inevitably, evidentiary determinations are not made in isolation: a judge might, for example, refuse to admit an unfairly prejudicial piece of probative evidence if there’s a far less prejudicial alternative.<sup>288</sup> But few would argue that admissibility determinations should be a

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104, at 164–65 (arguing that corroborating evidence can do necessary work to produce social conviction in a verdict); *see also* McLain, *supra* note 64, at 425 (noting that in several contexts where the rules of evidence do not apply, such as sentencing, due process demands that the decision not be based solely on hearsay and arguing for an approach where hearsay statements of intent can be used to prove the conduct of a third party, but without sufficient corroborating evidence, that hearsay could not serve as the basis for a conviction); Van Kessel, *supra* note 103, at 532, 533–34 (suggesting corroboration sufficiency rules may be appropriate to “insure verdict integrity”); Thompson, *supra* note 18, at 1525–28 (arguing sufficiency prevents convictions based on false eyewitness identifications, while giving victims an opportunity to speak and creating good incentives for law enforcement); Boaz Sangero, *Miranda is Not Enough: A New Justification for Demanding “Strong Corroboration” to a Confession*, 28 CARDOZO L. REV. 2791, 2791 (2007) (arguing sufficiency rules may prevent the conviction of innocent persons who confessed to a crime); *cf.* FED. R. EVID. 406 advisory committee’s note on proposed rule (“[A corroboration] requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility.”).

<sup>286</sup> *See, e.g.*, *Idaho v. Wright*, 497 U.S. 805, 823 (1990) (opining that corroboration can be used for harmless-error analysis).

<sup>287</sup> *See generally* Mnookin, *supra* note 46, at 1257 (discussing “atomism” versus “holism”).

<sup>288</sup> *See Old Chief v. United States*, 519 U.S. 172, 184–86 (1997).

mere reflection of the quality of the party's case. The evidentiary maxim, "[a] brick is not a wall,"<sup>289</sup> means that each individual piece of evidence need not be sufficient to prove a fact in order to be relevant to that fact. And relevant evidence is by default admissible.<sup>290</sup> The understanding is that admissibility and sufficiency are different, and evidence gets admitted piece by piece until it builds a case. If, after the evidence is in, a reasonable jury could not decide in favor of one side, the court may grant judgment as a matter of law or a judgment of acquittal.<sup>291</sup> This understanding of evidentiary rules gives appropriate power to the jury while maintaining the judge as a check, both on the evidence that gets to the jurors and on the verdict.

A sufficiency rule, however, is the appropriate way to protect verdicts from being based on evidence that the court or legislatures deem insufficient to sustain a verdict. It avoids the structural confirmation bias problem—it therefore avoids the need to separate permissible corroboration from impermissible corroboration. The court's task is more straightforward: first, determine whether evidence in the case is of the type that triggers the rule; second, determine whether there is sufficient corroboration. The court or legislature that creates a rule will have to decide both what type of evidence requires corroboration and how much corroboration is necessary; I address those both in Section B below.

Sufficiency rules also have several of the benefits of admissibility rules. For one, like admissibility rules, sufficiency rules have an evidence-forcing function, incentivizing parties to search for more reliable evidence. As Sandra Guerra Thompson has observed, under a corroboration sufficiency rule, prosecutors will not accept cases for prosecution without corroboration, which incentivizes police officers to search for additional evidence.<sup>292</sup> And like admissibility rules, sufficiency rules prevent verdicts that rest on unreliable evidence.

### 3. *Differences in Admissibility and Sufficiency Rules*

Is there any real difference between admissibility rules and sufficiency rules in practice? Even if *theoretically* courts shouldn't make sufficiency determinations at the admissibility

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<sup>289</sup> FED. R. EVID. 401 advisory committee's note on proposed rule (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 152 (1954)).

<sup>290</sup> FED. R. EVID. 402.

<sup>291</sup> See FED. R. CIV. P. 50(a)(1)(B); FED. R. CRIM. P. 29(a).

<sup>292</sup> See Thompson, *supra* note 18, at 1495–96 (discussing a corroboration rule for eyewitness identification).



stage, to the extent that the standard is the same for excluding the evidence and granting judgment as a matter of law, does styling the rule one way or the other make a difference?

It certainly *can*, for at least four reasons. First, courts may consider different evidence when applying admissibility rules and sufficiency rules. For example, assume an admissibility rule requires that the corroboration be admitted into evidence for the court to consider it. The court typically will not know the full scope of the evidence that will be introduced at trial. It knows what evidence has been introduced to that point, and the proponent might proffer other evidence that it plans to admit later in the trial.<sup>293</sup> But only after the parties rest can the court be certain. A few possible results may flow from this. For one, the court may simply operate with a different evidentiary record in an admissibility determination than it would with a sufficiency determination in the same case, potentially coming to a different decision than it otherwise would. For another, under an admissibility rule, the court might admit the evidence on the condition that corroborating evidence be introduced later in the trial.<sup>294</sup> Finally, if the court *refuses* to make a conditional ruling—perhaps because it cannot fully judge the weight of the corroborating evidence until it has been introduced<sup>295</sup>—the proponent may need to order its case to present the corroboration before it presents the hearsay. Under an admissibility rule, then, if the court is not willing to make a conditional ruling, and if it requires the corroboration to be admitted, either the court will make the decision on a limited record, or the proponent will have to skew the structure of its case to introduce the hearsay later on.

Then again, an admissibility rule may *not* require that the corroborating evidence be admitted. This would create a different conflict with sufficiency rules, as court making a sufficiency determination—one considering whether a party's *case* is sufficient—will be limited to the evidence admitted at trial.

Admissibility rules and sufficiency rules might also differ with respect to the standard of review on appeal.<sup>296</sup> An admis-

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<sup>293</sup> FED. R. EVID. 104(a) (implying that a court may hear evidence when deciding questions of admissibility); *see also* FED. R. EVID. 104(b) (providing that in conditional relevancy determinations—not determinations about whether an exclusionary rule applies—courts may admit evidence on the condition that certain proof be introduced later).

<sup>294</sup> Ayling, *supra* note 48, at 1142.

<sup>295</sup> *See id.*

<sup>296</sup> *See id.* at 1142–44. Ayling's discussion of the standards that would apply is somewhat outdated.

sibility ruling would be reviewed for abuse of discretion,<sup>297</sup> with courts of appeal giving deference to the trial court's ruling. A decision on a motion for judgment as a matter of law in a civil case is typically reviewed *de novo*,<sup>298</sup> as is a decision on a motion for judgment of acquittal in a criminal case.<sup>299</sup> If this held for corroboration rules, admissibility rules would give the trial judge more power than sufficiency rules.

Further, while admissibility rules are applied by judges only, either the judge or a jury might apply a sufficiency rule. Yes, the court might make a sufficiency ruling on a judgment as a matter of law. But in some cases, and under some sufficiency rules, the court might instead instruct the jury that it may convict only if there is sufficient credible corroborating evidence of, say, the child's accusatory statement. If the jury interprets ambiguous evidence not to corroborate the statement, or it finds that the corroborating evidence is, itself, not credible, it will not convict.

Finally, sufficiency rules create asymmetries that admissibility rules don't, affecting what sorts of evidence can be governed by each. The proponent of the evidence—who typically has the burden of proof on questions of admissibility<sup>300</sup>—may not be the party with the burden of proof at trial. A corroboration admissibility rule would apply equally to plaintiffs and civil defendants, prosecutors and criminal defendants. A sufficiency rule, on the other hand, would apply unevenly to plaintiffs and defendants.<sup>301</sup> It is easy enough for a court to conclude that, as a matter of law, the plaintiff has failed to prove its case. But if the defendant offered uncorroborated hearsay, the court could grant judgment as a matter of law to the plaintiff only if no reasonable jury could fail to credit the plaintiff's evidence. That will rarely be the case, even when the defendant has no counterproof; deeming the defendant's evidence insufficient to *negate* the plaintiff's proof will have little practical effect. The disparity is even starker in the criminal context. If the hearsay is submitted by the defendant on an

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<sup>297</sup> See *General Electric Co. v. Joiner*, 522 U.S. 136, 141 (1997).

<sup>298</sup> *Campbell v. District of Columbia*, 894 F.3d 281, 286 (D.C. Cir. 2018); *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 699 (6th Cir. 2006).

<sup>299</sup> *United States v. Maher*, 955 F.3d 880, 884 (11th Cir. 2020); *United States v. White*, 794 F.3d 913, 918 (8th Cir. 2015).

<sup>300</sup> 1 MUELLER & KIRKPATRICK, *supra* note 43, at § 1:32.

<sup>301</sup> I use "plaintiff" as shorthand for "the party that bears the burden of proof." If the evidence went to prove or defeat an affirmative defense—or some other issue on which the defendant bears the burden of proof—the roles would be reversed.

issue on which the prosecutor bears the burden of proof, the court cannot direct a judgment of conviction.

This is the strongest argument against sufficiency rules for categories of unreliable evidence that are likely to arise on both sides of litigation, particularly in civil cases. In criminal cases, there may be reasons to grant the defendant leeway that prosecutors do not have.<sup>302</sup> A single category of evidence might be offered by both sides, but we might attach a consequence to lack of corroboration only when the prosecutor offers that evidence. And certain categories of evidence that have traditionally been subject to corroboration rules may be offered overwhelmingly by the prosecution, such as child hearsay statements, eyewitness identifications, and accomplice statements. It is sensible to subject those to sufficiency rules if the prosecution offers them but have no such requirement in the rare case that the defendant does—basing an acquittal on unreliable evidence is not nearly as troubling as basing a conviction on one.

But in civil cases, there is little reason to put plaintiffs and defendants on unequal footing, and hearsay can be offered by either party. In those cases, it would be inappropriate to attach consequences to lack of corroboration when the evidence is offered by the party with the burden of proof but not when the evidence is offered by the party without the burden. Sufficiency rules are ill-suited to those circumstances, and admissibility rules—with all their foibles—are the better option. Indeed, most existing corroboration sufficiency rules apply to the prosecution in criminal cases.<sup>303</sup>

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<sup>302</sup> See Myeonki Kim, *The Need for a Lenient Admissibility Standard for Defense Forensic Evidence*, 86 U. CIN. L. REV. 1175, 1176 (2018) (arguing that courts should apply a lower standard of reliability for defendant-side forensic evidence rebutting the prosecutor's evidence); Joan L. Larsen, Comment, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651, 653, 660 (1993) (arguing that "Rule 404(b) should operate only as a shield for the accused," and observing that several courts "have created a lower standard for the admissibility of the accused's exculpatory specific acts evidence"); see also FED. R. EVID. 404(a)(2)(A) (permitting the prosecutor to introduce character evidence about the defendant only if the defendant opens the door); FED. R. EVID. 609(a)(1)(B) (creating a higher standard for introducing past convictions to impeach a criminal defendant witness); FED. R. EVID. 803(8)(A)(ii) (excepting matters observed by law-enforcement personnel from the public records exception).

<sup>303</sup> See *supra* Part III.A.1. But see Leubsdorf, *supra* note 266, at 618, 621 n.59 (noting certain corroboration sufficiency rules in non-criminal cases, including contested divorces, asylum proceedings, and priority determinations in patent cases). Even in these cases, the rule applies to the party with the burden of persuasion.

In many cases, a sufficiency rule may operate no differently from a rule providing that the evidence is admissible if there is sufficient corroboration for a reasonable jury to find the fact. Either way, the jury will not be able to find in favor of the proponent if there is insufficient corroboration. But the differences discussed in this section—significance of the order of presentation on what evidence the court will consider, different standards of appellate review, and most importantly, difficulty in applying a sufficiency rule to a party without the burden of proof—can make a real difference in individual cases and have repercussions for when sufficiency rules versus admissibility rules are appropriate.

### B. Crafting and Applying Sufficiency Rules

What does a good sufficiency rule look like? The court or legislature creating the rule has two decisions to make: first, whether the rule should exist at all for a specified category of evidence—whether that category of evidence is insufficient to sustain a verdict absent corroboration—and, second, how much corroboration is necessary to permit a verdict in favor of the party offering the evidence.

The first determination—that some category of evidence must be corroborated to sustain a conviction—is fraught. For one, a corroboration requirement endangers truth-seeking if it is imposed on evidence that is sufficient to sustain a verdict under the burden of proof. For another, it has an expressive effect: when a government body determines that a class of evidence cannot sustain a verdict without corroboration, it publicly labels that category of evidence unworthy of belief. This was a central justification for states that maintained a corroboration rule in rape cases: false accusations of rape were thought to be more common than false accusations of other crimes; in other words, rape complainants were thought to be unreliable.<sup>304</sup> The rape corroboration requirement was harm-

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<sup>304</sup> See Note, *Corroborating Charges of Rape*, *supra* note 279, at 1138 (“Surely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false . . . . Since stories of rape are frequently lies or fantasies, it is reasonable to provide that such a story, in itself, should not be enough evidence to convict a man of crime.”); Estrich, *supra* note 273, at 1137; Friedman, *supra* note 276, at 1373; see also Younger, *supra* note 275, at 277 (“The danger sought to be avoided by the corroboration rule is that of the deranged complainant who invents a story of sexual indignities visited upon her.”). Later iterations of the corroboration requirement disavowed this rationale, focusing on “the difficulty of defending against [a] false accusation.” See, e.g., MODEL PENAL CODE § 213.6 cmt. 6, at 426–27, 428–29 (AM. L. INST. 1980).

ful for several reasons. It could compromise accuracy, not least because corroboration is particularly unlikely to be present in cases of sexual assault, so those cases were difficult to prove.<sup>305</sup> And it communicated the harmful message that (largely female) sexual assault complainants are unreliable or unworthy of belief.<sup>306</sup> The 1892 extension of the Chinese Exclusion Act, which required a “Chinese laborer” without a certificate of residence to prove his residence by “at least one credible white witness,”<sup>307</sup> similarly communicated that Chinese and Chinese-American witnesses were not trustworthy.<sup>308</sup>

Courts and legislatures that craft corroboration requirements should do so with an eye toward both concerns. They should impose these requirements based on empirical evidence, not on stereotypes or folk psychology, and with an eye toward the values expressed by the requirement. A corroboration requirement is appropriate when significant evidence demonstrates that a category of evidence is flawed, particularly if the evidence also indicates that jurors are likely to overestimate the probative value of that evidence. For example, the dangers of eyewitness identification are well known,<sup>309</sup> and, as Thompson has argued, a rule requiring that stranger eyewitness identification testimony be corroborated before it can serve as the basis of a criminal conviction may well be warranted.<sup>310</sup> Child hearsay statements in criminal child abuse cases pose a more difficult problem. Very young children have several virtues as

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<sup>305</sup> Estrich, *supra* note 273, at 1175; Anderson, *supra* note 277, at 979–80.

<sup>306</sup> Cf. Orna Alyagon Darr, *Relocated Doctrine: The Travel of the English Doctrine of Corroboration in Sex Offense Cases to Mandate Palestine*, 26 YALE J.L. & HUMAN. 185, 206–07 (2014) (suggesting that a corroboration doctrine applied to sex offenses in Mandate Palestine “expressed prejudice concerning the truthfulness of the locals”); Maggie Wittlin, Note, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REGUL. 419, 423–29 (2011) (discussing expressive theories of law).

<sup>307</sup> The Geary Act, ch. 60, § 6, 27 Stat. 25, 25–26 (1892) (amended 1943).

<sup>308</sup> See *Fong Yue Ting v. United States*, 149 U.S. 698, 729–30 (1893) (holding the Act within Congress’s power and noting that the reason for the requirement “may have been the experience of congress . . . that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, ‘was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.’” (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 598 (1889))).

<sup>309</sup> See Thompson, *supra* note 18, at 1489–91; Fiona Leverick, *Jury Instructions on Eyewitness Identification Evidence: A Re-Evaluation*, 49 CREIGHTON L. REV. 555, 559–61 (2016) (reviewing the literature).

<sup>310</sup> See Thompson, *supra* note 18, at 1523–28, 1541 (arguing for a corroboration requirement for eyewitness identification testimony).

declarants, including “reasonably good” memory and an underdeveloped ability to lie.<sup>311</sup> But they are also suggestable, so “a statement made by a child who has been subjected to strong forms of suggestion may be notably *unreliable*.”<sup>312</sup> A state might reasonably impose a corroboration sufficiency rule on child hearsay statements of abuse due to the potential for suggestion and the high stakes of the case for the defendant.<sup>313</sup>

The entity creating or interpreting a corroboration rule will also have to determine how much corroboration is necessary to satisfy the requirement. Courts have struggled to articulate a standard for how much corroboration is sufficient.<sup>314</sup> One option, appropriate where there is no concern about systematic overvaluation of the evidence, would be to find the evidence sufficient when a reasonable jury, assigning both the evidence-of-concern and the corroboration appropriate probative value, could find the burden of proof satisfied. The question becomes more difficult when jurors systematically overvalue the evidence, as they likely do with eyewitness testimony, for example.<sup>315</sup> Again, we have a tension between maximizing accuracy and respecting the role of the jury.

Deeming the evidence sufficient when a reasonable jury *could* find for the party with the burden of proof will result in a disproportionate number of verdicts in favor of that party. When the proponent is a prosecutor, that dynamic is of particular concern. Courts can guard against this problem, to a degree, by excluding particularly prejudicial evidence under Rule 403, the rule that permits them to exclude evidence when “its probative value is substantially outweighed by a danger

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<sup>311</sup> Friedman & Ceci, *supra* note 5, at 101.

<sup>312</sup> Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 95 (2000).

<sup>313</sup> Corroboration rules should apply only to evidence that is valuable enough to be admitted in the first instance. There is no reason to have a corroboration rule for forensic evidence obtained through scientifically invalid methods, for example. That evidence, which has little probative value, should be excluded at the outset.

<sup>314</sup> 5C TEGLAND & TURNER, *supra* note 39, at § 807.8 (“In the end, the sufficiency of the corroborating evidence is determined on a case-by-case basis, with the trial court given a measure of discretion to weigh competing considerations.”) (referring to an admissibility rule with a sufficiency-based rationale); *State v. Jones*, 772 P.2d 496, 499–500 (Wash. 1989) (“The Legislature has offered no specific guidance on how this balance is to be struck. Similarly, we feel it unwise to suggest any hard and fast rules.”).

<sup>315</sup> See Justin Amirian, Note, *Weighing the Admissibility of fMRI Technology Under FRE 403: For the Law, fMRI Changes Everything—and Nothing*, 41 FORDHAM URB. L.J. 715, 748–50 (2013); Jennifer L. Overbeck, Note, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895, 1903–04 (2005).

of . . . unfair prejudice.” Although courts are unlikely to keep out eyewitness testimony under Rule 403, case-by-case determinations that exclude evidence that the jury will grossly overvalue can mitigate the problems with a traditional sufficiency rule.<sup>316</sup>

The entity creating or interpreting the rule will also have to give it bite. Courts regularly exclude evidence under admissibility rules. But while courts do, sometimes, grant judgments of acquittal,<sup>317</sup> it is not a regular occurrence, and judges may be understandably reluctant to take cases from the jury. Sufficiency rules should therefore be crafted with sufficient specificity and force that courts will take seriously the obligation to acquit.

### C. Crafting and Applying Admissibility Rules

What does a good admissibility rule look like—or rather, how should a court apply an admissibility rule? For this analysis, I focus specifically on the amended residual exception to the hearsay rule, which requires courts to consider “the totality of circumstances under which [the statement] was made and evidence, if any, corroborating the statement” when determining whether “the statement is supported by sufficient guarantees of trustworthiness.”<sup>318</sup> Drawing on the analysis above, I suggest how a court using the dominant understanding of trustworthiness might apply the rule. To demonstrate how this might work in practice, I use one of the (still few) written opinions that analyze an admissibility question under the amended residual exception.

The case—reasonably typical of corroboration cases—is *United States v. Hayek*.<sup>319</sup> Defendant Hayek was charged with several federal offenses based on allegations that he exchanged

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<sup>316</sup> On the other extreme, a court might determine that the evidence is sufficient only when the corroborating evidence independently suffices to meet the proponent’s burden of proof. That would negate the value of the contested evidence entirely, for purposes of the sufficiency determination. With highly unreliable evidence, that might be desirable, but for evidence of significant probative value, such as eyewitness testimony, the evidence should probably carry some weight in the sufficiency determination.

<sup>317</sup> See Standing Comm. on Rules of Prac. and Proc., Meeting Minutes 17 (Jan. 13–14, 2005), <https://www.uscourts.gov/file/14865/download> [<https://perma.cc/NNM8-3FED>] (noting that then-Associate Deputy Attorney General Christopher Wray explained that over a four-year period, federal judges had granted 259 Rule 29 judgments of acquittal).

<sup>318</sup> FED. R. EVID. 807(a)(1).

<sup>319</sup> No. 2:18-CR-160, 2021 WL 3161469 (E.D. Tenn. July 26, 2021).

explicit photographs with a minor girl.<sup>320</sup> Hayek moved to exclude a video recording of the child's forensic interview. Although the defendant challenged the video on Rule 403 grounds, not on hearsay grounds,<sup>321</sup> the court performed hearsay analysis. It observed several circumstantial guarantees of trustworthiness, including that the interviewer gave the child freedom to talk not only about the abuse but also about other topics, told her multiple times that she would not get in trouble for anything she said, and did not promise her anything in exchange for her statement.<sup>322</sup> As for corroboration, the court relied on an interview that the defendant gave to law enforcement after his arrest. The court observed that "both interviews overlap in subject matter, particularly how the defendant and the minor began texting on Kik, the minor's age, and the types of pictures allegedly sent from the defendant and from the minor."<sup>323</sup> I also note that both the victim and the defendant identified the defendant's username.<sup>324</sup> The court found that the statement was supported by sufficient guarantees of trustworthiness; that because the interview was near in time to the offense, it was more probative than other evidence the government could obtain through reasonable efforts and therefore met the second prong of Rule 807(a); and that it was admissible.<sup>325</sup>

Under the dominant "inherent trustworthiness" understanding of "trustworthiness," the court should determine whether the evidence was made by a process that tends to produce accurate statements by considering evidence of the

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<sup>320</sup> Criminal Complaint at 2, *Hayek*, 2021 WL 3161469 (No. 2:18-CR-160), ECF No. 3; Indictment at 1–2, *Hayek*, 2021 WL 3161469 (No. 2:18-CR-160), ECF No. 5.

<sup>321</sup> Rule 403 permits courts to exclude evidence if its probative value is substantially outweighed by a risk of unfair prejudice. The defendant noted the video's "likelihood of . . . admission under Rule 807." Motion to Preclude Introduction of Video Recording of Interview at 2, *Hayek*, 2021 WL 3161469 (No. 2:18-CR-160), ECF No. 129. Considering that the child was going to testify—hence the lack of an objection under the Confrontation Clause—it seems the defendant's attorneys could have pushed harder not only on the trustworthiness prong but also on the Rule 807 requirement that the statement be "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." FED. R. EVID. 807(a)(2); see Witness List at 1, *Hayek*, 2021 WL 3161469 (No. 2:18-CR-160), ECF No. 157 (showing the victim planned to testify).

<sup>322</sup> *Hayek*, 2021 WL 3161469, at \*2.

<sup>323</sup> *Id.*

<sup>324</sup> Criminal Complaint, *supra* note 320, at 2; Report and Recommendation at 6–7, *Hayek*, 2021 WL 3161469 (No. 2:18-CR-160), ECF No. 103.

<sup>325</sup> A jury found Hayek guilty on five counts on July 30, 2021. Verdict Form at 1–3, *Hayek*, 2021 WL 3161469 (No. 2:18-CR-160), ECF No. 156.



circumstances under which it was made and evidence of corroboration of “other facts”—facts within the statement other than the fact it is offered to prove. The court may consider both admissible and inadmissible corroboration, but it should discount less-reliable corroboration appropriately, and it should not consider corroboration that is inadmissible for constitutional or policy reasons. It should see if there is sufficient evidence that it has no significant concerns about the testimonial capacities of the declarant.

To determine whether the child’s statement was sufficiently trustworthy, the court would consider evidence about the circumstances under which the victim’s statement was made, including the lack of leading questions and the victim’s lack of a motive to lie. It would also consider corroboration, although some of the corroboration is properly considered, and some is not. In the actual case, the court considered, as corroboration, the defendant’s statement about “the types of pictures allegedly sent from the defendant and from the minor.”<sup>326</sup> In other words, the court considered the fact that the defendant essentially confessed to the exact crimes with which he was charged—and of which the victim accused him in her forensic interview. However, by using the fact that the police had obtained a confession to the charged crimes as evidence that the victim’s statements were worthy of significant weight, a court engages in the sort of Bayesian-irrational reasoning that I have warned against. Under the inherent trustworthiness idea, the court should not consider the fact that the defendant confessed to the crimes.

On the other hand, the defendant confirmed his username, which the victim correctly identified during the forensic interview. Although this could be used for substantive purposes—to show that the victim had knowledge of the defendant’s personal information, which tends to prove a prior relationship between them<sup>327</sup>—it could, alternatively, be used to prove that because the victim was a truthful reporter with regard to one fact, she is more likely to be truthful with regard to the rest of her statement. The defendant’s statement is partly independent of the victim’s statement. His confession was elicited by a police interview, and the police already had the information from the victim at that time. In many cases, this might raise

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<sup>326</sup> *Hayek*, 2021 WL 3161469, at \*2.

<sup>327</sup> See *Bridges v. State*, 19 N.W.2d 529, 536 (Wis. 1945) (holding that the victim’s description of the defendant’s room was not hearsay because it was not used for the truth but rather as evidence of the victim’s knowledge).

suspicion that the police could have influenced his statement. However, in this case, the defendant did not appear to contest his username. This corroborated, apparently undisputed detail tends to prove that the victim's hearsay is reliable. It does not prove her testimonial capacities beyond all doubt, of course. It does strongly suggest that she is observant and has a reasonably good memory and that she is able to express herself clearly. And it is certainly *probative* of her sincerity, but the corroboration of one fact among many—and not the most damning that she said—is not extremely strong proof of her sincerity.

Still, based on a combination of the circumstantial guarantees of trustworthiness and that corroboration, a court might reasonably have sufficient confidence in the inherent trustworthiness of the statement to admit it under the residual exception. This approach most closely resembles what judges both will and should do under Rule 807.

Although in *Hayek*, the statement was corroborated, this does not mean that evidence *must* be corroborated to be admissible under Rule 807. Corroboration is only one consideration. Although no trace remains in the Advisory Committee notes, part of the motivation behind the amendment to Rule 807 appears to have been expanding the exception to permit more hearsay to come in under it.<sup>328</sup> So the requirement to consider corroboration should not serve to limit the amount of hearsay that can come in under the exception; rather it provides an additional consideration for the court when determining whether the statement has sufficient guarantees of trustworthiness. A statement that would have come in under the pre-amendment Rule based solely on circumstantial guarantees of trustworthiness should not be excluded because of lack of corroboration,<sup>329</sup> unless the absence of corroboration under the particular circumstances indicates lack of trustworthiness.

This analysis was specific to the amended Rule 807, but it largely applies to any corroboration rule where the evidentiary danger is lack of trustworthiness—whether the rule merely directs courts to consider corroboration, or it requires corrobora-

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<sup>328</sup> See Capra, *supra* note 12, at 1579.

<sup>329</sup> Before the amendment, the Rule confusingly required “‘equivalent’ circumstantial guarantees of trustworthiness” to the other hearsay exceptions. FED. R. EVID. 807 advisory committee’s note on 2019 amendment. That makes comparison somewhat difficult, but to the extent courts made a more flexible sufficiency determination despite the language, this Rule would continue that approach.

tion but allows the court to determine how much corroboration is necessary.

#### CONCLUSION

Although this Article entertains multiple theories of trustworthiness and multiple ways to implement those theories, it maintains, throughout, an optimism about the law of evidence as a vehicle for facilitating rational truth-seeking at trial. Perhaps that optimism is undeserved—several Rules of Evidence are rooted in outdated folk psychology,<sup>330</sup> and some do systematic harm to criminal defendants.<sup>331</sup> Jurors, certainly, do not act as perfect Bayesians. And reasonable theories of evidence rely on logics other than Bayesian reasoning.<sup>332</sup> But I do believe it is worth evaluating and critiquing the rules of evidence with eyes on the rational truth-seeking prize. I have argued that corroboration rules pose several complications for rational truth-seeking, and that rule makers, courts, and legislatures should handle them with care. With more finely tuned corroboration rules, I hope, trials will be fairer and more accurate, and the settlements and plea negotiations that take place in their shadow will better reflect the true values of each party's case.

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<sup>330</sup> See *United States v. Boyce*, 742 F.3d 792, 800–02 (7th Cir. 2014) (Posner, J., concurring).

<sup>331</sup> See Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1992–2014 (2016) (critiquing the impeachment of criminal defendants by prior conviction); Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 401–33 (2018) (using empirical evidence to analyze implications of the ability to introduce a defendant's prior criminal convictions if the defendant testifies, including the "silence penalty" imposed by the jury if the defendant does not testify).

<sup>332</sup> See, e.g., Allen & Pardo, *supra* note 22, at 5 (advocating for understanding evidence law using the theory of "relative plausibility").