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RULES OF EVIDENCE AND SUBSTANTIVE POLICY

David P. Leonard *

I.

Although the modern trial serves a complex blend of functions,¹ most would agree that its primary purpose is to determine and vindicate the substantive legal rights of the parties.² In both civil and criminal trials, we search for some sense of historical "truth," however elusive it may be, in an effort to determine the rights and obligations of the parties and the necessity of remedial action or punishment. And for better or for worse, in American trials an elaborate system of formalized rules and standards governs the nature of evidence that the trier of fact may hear and the process by which that evidence may be offered.

Because these rules of evidence do not purport to establish or limit substantive rights, one could conceive of them as subordinate to rules of law that do define such rights. Thus, when two parties litigate their respective rights and obligations following an intersection collision between their automobiles, tort law creates and circumscribes those rights. If

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1. What purposes the trial serves is, of course, a very complex question, and one that merits a great deal of further study. I have previously discussed some of the trial's purposes in David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence, 58 U. COLO. L. REV. 1, 31-42 (1986-87); see also Milner S. Ball, The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater, 28 STAN. L. REV. 81, 115 (1975) (asserting that judicial proceedings are similar to theater production); Mark Cammack, The Evidence Rules and the Ritual of Trials: "Saying Something of Something", 25 LOY. L.A. L. REV. 783, 789-91 (1992) ("If formality and repetition is the hallmark of ritual, the judicial trial must be counted as among the most decidedly ritualistic institutions of our society."); Charles R. Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 HARV. L. REV. 1357, 1360 (1985) (stating that trial-truth-seeking process is concerned with justice); Charles R. Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 HARV. L. REV. 1187, 1194 (1979) (proposing that objective in trial system is to determine truth and resolve dispute); Laurence H. Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 HARV. L. REV. 1329, 1376 (1971) (asserting that lawsuit is both search for truth and ritual).

2. 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 37.1, at 1018 (Tillers rev. 1983) ("Accurate factfinding should be the central purpose of the law of evidence.").

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Party A is found to have driven without exercising reasonable care for the safety of another driver, Party B, and that breach of the standard of reasonable care is found to have caused damage to B, the law of tort permits entry of judgment for B. Similarly, if in a prosecution of D for the murder of V, D is found to have killed V while possessing the requisite mental state, the criminal law permits a verdict of guilty. In both examples it is substantive law that governs the parties' rights and obligations; ostensibly, neither the law of evidence nor any other set of rules has that effect.

This reasoning, however, is flawed, and the flaw can be seen even in these two simple examples. To say, in the first, that A may be held liable to B "if it is found" that A failed to exercise reasonable care and caused B's damage is to ignore the potentially important effect that rules of civil procedure and evidence might have on the outcome of the case. First, trials do not proceed merely by the recitation of facts or the telling of competing stories. Rather, they operate within a framework that allocates among the parties the risk that insufficient evidence will be available to tip the jurors' minds in either direction. We call the allocation of these risks "burdens of persuasion," and in the hypothetical auto accident case, the law allocates in A's favor the risk of inadequate or ambiguous evidence. The jury will be charged to find for A, the defendant, unless B can persuade the jurors that A breached a duty of reasonable care and that such breach caused B's damage. And in the criminal case the court will instruct the jury that it must acquit D unless the prosecution has proven D's guilt "beyond a reasonable doubt."

Furthermore, not only will the allocation to B of the burden of persuasion require that B produce evidence sufficient to tip the scales in her favor, but such allocation also places upon B the burden of "going forward," or offering evidence, to meet that standard. Unless B offers evidence so overwhelming as to justify a judgment in her favor without even resorting to the jury (something which rarely occurs), A is entitled to have the jury decide the case even if she offers no evidence at all. Even though the technical burden the law places on B in a civil case is only to offer evidence sufficient to support a conclusion that she has proven the elements of the cause of action by a "preponderance of the evidence," the fact that the law places such a burden upon B rather than A has potentially significant effects. Specifically, the rules of civil procedure that es-

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3. One might say "requires" a judgment for Party B but given the freedom enjoyed by jurors and the relative inviolability of their deliberative processes, "requires" would be too strong a word. See Fed. R. Evid. 606(b).
tablish such burdens affect B's chances of having her rights vindicated by the trial.

The same analysis holds true in the hypothetical murder prosecution. The process of "finding" that D committed the killing while possessing the requisite mental state is not a neutral one. In theory, the trial begins with the deck stacked heavily against the prosecution; unless it can offer rather strong evidence against D—evidence strong enough to survive a motion for acquittal—D need never offer any testimony in her defense. And while it might be true that in practice, the civil "preponderance" burden is not often significant enough to affect the vindication of substantive rights, it is undeniable that the prosecution's burden to prove its criminal case "beyond a reasonable doubt" places upon it a rather heavy burden. The risk of error caused by a lack of evidence, in other words, is clearly shouldered by the prosecution.5

One might argue that little is achieved by labeling rules creating burdens as "procedural rules" rather than substantive rules, and then remarking on the effect these rules can have on the determination of substantive rights. While the line between "procedural" and "substantive" rules is not clear, it is clear that in our normal consideration of, for example, rules of tort law, we do not think of burdens of persuasion as among the "elements" a party must prove in order to prevail. The rule placing the burden of persuasion on a party is a rule allocating the risk of error, not one establishing the parameters of responsibility in those cases in which the evidence necessary to effect a reasonable construction of the facts is available. Also, it is demonstrable that at least within some range, the designation of particular rules is a matter of broad agreement. Few would argue, for example, that rules setting forth the number of days one has to answer a complaint6 or governing whether a complaint must be signed by the party or attorney7 are rules of substantive law.

This does not mean, however, that even those rules that we would broadly agree are procedural do not affect substantive rights. A party's

4. This is not necessarily true in practice, of course. It is very likely that jurors assume even before hearing evidence that the prosecution has at least a relatively strong case. Moreover, jurors likely realize that very weak cases usually do not reach trial, and that while the very strongest cases are generally settled by plea bargaining, the state is unlikely to expend significant resources trying extremely doubtful cases.

5. The criminal defendant's constitutional rights, in particular the Fifth Amendment privilege against compulsory self-incrimination, U.S. CONST. amend. V, also adds to the prosecution's burden. Not only may the prosecution not require the defendant to testify but the fact finder is prohibited in most instances from drawing an adverse inference from the defendant's failure to take the stand. Griffin v. California, 380 U.S. 609, 614-15 (1965).


failure to answer a complaint within the specified period of time, or to sign a complaint, can result in a default judgment against that party that is manifestly contrary to the result that would be reached if the actual facts of the case were to come to light. Nevertheless, for various good reasons, the law allows these contrary results.

The goal of this Essay is to begin to construct a similar analysis of the functions of evidence rules. Many of our rules of evidence do not merely facilitate the proof of facts. They also have a significant effect on the law’s substantive goals, sometimes helping to further those goals and sometimes impeding them. It is important to recognize this fact about rules of evidence both as a way to better understand our complex evidence rules and as a guide to reforming them. And it is particularly appropriate to address this question in the context of a symposium devoted to exploring whether evidence law matters. As this Essay will demonstrate, one reason evidence law does indeed matter is that it plays an important role in the effectuation of our law’s substantive aims.

II.

If trials function primarily to determine and vindicate substantive legal rights, it follows that the rules governing the evidentiary process—rules that establish what evidence will be admissible and that govern the permissible means of offering admissible evidence—should be subordinate. Those rules must in some significant fashion serve the overriding goals of the substantive law. It would be foolish to argue that the trial exists in any meaningful way to vindicate the evidentiary rules themselves.

Even a quick look at the evidence rules, however, reveals that the situation is more complex than at first it appears to be. The rules serve a multitude of both substantive and non-substantive purposes. Perhaps the most central (though most overlooked) provision of the Federal Rules of Evidence specifically refers to the purposes and interpretation of the entire set of rules: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”

There is much more to this short rule than at first meets the eye, and

8. “Perhaps adjective law in the courtroom so clearly is an adjunct to accomplishing something else, such as truth-finding, that no one is tempted to believe it is an end in itself.”

Roger C. Park, Evidence Scholarship, Old and New, 75 MINN. L. REV. 849, 866 (1991). This is true even though the law’s substantive goals are at times elusive or conflicting.

perhaps more to the purposes of the rules than can fairly be implied from the language of this single provision. In fact, examining the purposes of evidence rules more specifically would reveal that rules are designed for a wide variety of purposes: (1) to enhance the accuracy of factfinding; (2) to provide for the satisfactory termination of the dispute; (3) to assure evenhanded treatment of the parties and fairness to their witnesses; (4) to aid in creating incentives or disincentives to particular forms of external\textsuperscript{10} conduct; (5) to prevent unwarranted intrusions into the private lives of the parties and witnesses;\textsuperscript{11} (6) to lend order and clarity to the presentation of testimony and exhibits; (7) to control the power of the state through its representatives, the judge and jury; and (8) to allocate the decision-making power between judge and jury.

In serving these various purposes, evidence rules sometimes directly affect substantive policy, sometimes have only a secondary effect, and at other times seem to have no impact on the rules of substantive law. Selected evidence rules will be discussed in light of these three possibilities.

III.

Many evidence rules directly affect substantive policy and do so in a number of ways. The rule prohibiting evidence of subsequent remedial measures when offered to prove negligence or culpable conduct\textsuperscript{12} is an example. Evidence that a landlord placed abrasive strips on a common stairway after a tenant slipped and fell on the stairs is not admissible in a negligence action brought by the injured tenant if the tenant wishes to offer such evidence to demonstrate that the stairs were in an unreasonably dangerous condition at the time of the accident. The rule affects substantive policy in at least two ways, the first of which provides the rule's primary purpose to serve a particular substantive policy, and the second of which is a necessary negative side effect to excluding the evidence.

First, the rule is designed to have a positive effect on an important substantive goal of tort law. Although most would agree that tort law functions primarily to compensate victims of accidents,\textsuperscript{13} it is also certainly designed to create incentives to engaging in particular conduct and

\textsuperscript{10} By “external” conduct I mean conduct other than at the trial itself—conduct in conducting the everyday affairs of life or business.

\textsuperscript{11} See, e.g., \textit{Fed. R. Evid.} 611 (court shall exercise control over mode and order of interrogating witnesses and presenting evidence so as to ascertain truth, avoid inefficiency and protect witnesses).

\textsuperscript{12} \textit{Fed. R. Evid.} 407.

disincentives to engaging in other forms of conduct. In particular, tort law constantly seeks ways to encourage people to take steps to minimize the risks of accidents. Even more particularly, it seeks to create incentives for those best able to take accident avoidance measures—one in a position to make a safety improvement in an unsafe product or condition is perhaps the paradigm example. Though there is plenty of room to doubt the true effect of legal rules on external conduct, it is at least logical to assume that were it not for the subsequent remedial measure rule, the landlord in our hypothetical slip-and-fall case would hesitate before repairing the stairway. The rule is therefore designed to deter just such hesitation, and by doing so, to lessen overall social harm. To the extent that it affects external behavior, it is an evidence rule that directly serves a substantive function.

Exclusion of evidence pursuant to this rule, however, also has a negative effect on the law's ability to achieve substantive goals. While not especially probative in many cases, evidence of a party's subsequent repair certainly satisfies the relevance test. There might be a number of reasons why a landlord would improve the condition of the stairs following an accident, but it is at least possible that in the landlord's mind, the stairs were in an unsafe state at the time of the accident. And because we can expect the landlord to be in a good position to judge the dangerousness of the stairs used by tenants, evidence of the repair under such circumstances certainly makes the possibility of unreasonable danger at the time of the accident "more likely than it would be without the evi-

14. Id. at 25.
15. Such doubts exist both for "substantive" and "procedural" rules, and particularly for the latter. Are social actors aware of the existence of rules of evidence governing the admissibility of their conduct at a trial? Even if they are aware, as might be the case for certain well-publicized rules such as the Miranda rule, Miranda v. Arizona, 384 U.S. 436 (1966), to what extent can and do such rules actually affect behavior? These are difficult questions beyond the scope of this Essay; for present purposes it is enough to recognize that some evidence rules are designed to have external incentive effects.
16. Of course the rule will not affect the landlord's conduct unless she is aware of the rule, which is somewhat doubtful. In many cases, we might expect the landlord simply to repair the stairs to avoid future accidents and her potential liability for those accidents. Thus, landlords might do the "right thing" even though ignorant of the rule excluding evidence of the repair. In a larger corporate setting, however, there is a greater chance that the rule will be known, or at least will become known in time to affect conduct. We might expect that a large manufacturer, somewhat more sophisticated in matters of liability, will contact counsel before making a safety alteration in its product. The manufacturer is somewhat more likely to make the repair after being advised that evidence of the repair will not be admissible to prove the defectiveness of the product in its prior condition.
17. Not all jurisdictions, of course, adhere to the subsequent remedial measure rule. Maine, for example, maintains exactly the opposite provision in its rules of evidence, providing that evidence of subsequent remedial measures is admissible. ME. R. EVID. 407(a).
Because the evidence is relevant, knowing of the repair might enhance the accuracy of the jury's factfinding and help it to determine correctly the substantive rights and obligations of the parties. The evidence rule denying the jury the right to hear such evidence thus reduces the possibility of accurate factfinding to some degree, and the risk of inaccurate assessment of the parties' rights and obligations becomes greater. Thus, the rule excluding evidence of subsequent remedial measures serves, in one respect, as an obstacle to the vindication of the tort principle that a landlord should be held responsible for failure to exercise reasonable care for the safety of tenants.

The subsequent remedial measure rule, therefore, has an intended positive effect on the important substantive policy of accident reduction but at some loss to the goal of accurate adjudication. The rule does not appear to serve any goals directly related to the trial process itself; it is almost purely a rule of evidence mandated by the demands of the tort law.

The rule excluding evidence of liability insurance appears to be much the same, but deeper analysis reveals a subtle difference. Like the subsequent remedial measure rule, it arguably increases the risk of inaccurate factfinding by preventing the jury from hearing and considering relevant evidence (though the argument that a party's possession of liability insurance might, for example, affect driving behavior is highly attenuated). And also like that rule, it exists in part to encourage certain

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19. There is, of course, an argument that the rule excluding evidence of subsequent remedial measures enhances the accuracy of factfinding by seeking to avoid unfair prejudice to the landlord. According to this argument, jurors, upon hearing that the landlord herself thought the condition of the stairs to be dangerous, might overvalue the evidence and ignore other evidence that points to lack of defect. In addition, the jurors might seek to punish the landlord for not acting earlier when she arguably knew of the danger. Each of these possible forms of prejudice enhances the risk of an improper judgment for the plaintiff tenant. I do not believe, however, that the risk of these forms of prejudice is particularly great in the application of the subsequent remedial measures rule. A stronger argument can be made in the application of the liability insurance rule. It is also possible that the subsequent remedial measures rule serves as a mechanism for furthering a different substantive goal of tort law—the prevention of future accidents—while sacrificing, to some degree, the principle of liability for harms negligently caused. If we value the prevention of future harm more highly than the principle of holding persons liable for the effects of their past negligence, the evidence rule helps to effectuate the hierarchy of these somewhat conflicting substantive policies.


21. It has been suggested that the evidence is irrelevant. See, e.g., Michael H. Graham, Federal Rules of Evidence in a Nutshell § 411.1, at 125 (1967) ("Evidence that a defendant is insured against liability is irrelevant on the issue of fault, for a person by reason of being insured is felt to be no more likely to act negligently or otherwise wrongfully."). Some have stated doubts about the relevance of such evidence. See Edward W. Cleary, McCOR-
external conduct, in this case carrying liability insurance which helps to further the compensation function of tort law. However, the rule excluding evidence of liability insurance might also decrease the risk of inaccurate factfinding by lessening the risk of unfair prejudice to the insured party. Specifically, it is reasonable to fear that if jurors are told that a defendant in a tort case possesses liability insurance, they will be more likely to find against that party, even if they believe that party’s conduct did not violate a duty toward the plaintiff; they may reason that any judgment awarded would not come out of that defendant’s pocket but rather out of the insurance company’s deep pockets. The rule thus gives at the same time it takes away; though it increases the risk of inaccurate factfinding by excluding arguably relevant evidence, it decreases that same risk by limiting the chance of unfair prejudice against the insured party. As with the subsequent remedial measure rule, the liability insurance rule does not appear to serve any function related to the adjudicatory process itself. Its purpose is essentially to serve the goals of tort law directly.

There are a few other evidence rules with even more overwhelmingly substantive effects. The rule excluding statements classified as “verbal acts” or “words of independent legal significance” from the definition of hearsay is an example. If the drafters of the Federal Rules of Evidence had believed such evidence to be irrelevant, it is unlikely they would have thought it necessary to create a special rule governing it, given the total prohibition of irrelevant evidence in Rule 402. FED. R. EVID. 402. The drafters recognized that such evidence might be relevant, though of little value: “At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse.” FED. R. EVID. 411 advisory committee’s note.

22. Rule 801(c) states that “[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c) (emphasis added).

“If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.” FED. R. EVID. 801(c) advisory committee’s note (citing Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev’d on other grounds, 340 U.S. 558 (1951)).
How will P seek to prove that a contract existed? Contract law generally requires that a party prove offer, acceptance and consideration. Thus, in this case, one item of proof will be that P herself said to D, “I offer to sell you ten widgets for one hundred dollars.” Without proof of her own statement, the offer, P cannot prove an offer was made and therefore that a contract existed, at least on the facts of the hypothetical as previously stated. The law of evidence, of course, does not interfere with P's proof in this regard. P's own words are treated as non-hearsay, and no other rule of evidence forbids their admission.

Why is this statement treated as non-hearsay? The traditional answer, of course, is that the words themselves are not being offered as proof of anything; they are the thing itself. That is, the speaking of the words, “I offer to sell you ten widgets for one hundred dollars” is the very “act” in issue—the making of the offer. The only difference between this “act” and other acts at issue in a trial, the explanation goes, is that this act happens to be verbal. The speaking of the words is as independently significant as driving your car into a pedestrian in a crosswalk. The act of speaking the words has “independent legal significance.”

After having taught evidence for a number of years, this explanation has become so ingrained in my mind that I sometimes find it difficult to see the problem in any other way. Certainly this explanation is correct, but I can understand why students often have difficulty learning the “verbal act” concept. It seems quite obvious to them that, in the language of the prevailing definition of hearsay, P's words constitute “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” As the students see it, P is sitting on the witness stand testifying about something she said to D out of court. Her out-of-court statement asserted that she was making an offer. And the words are being offered to prove that an offer was, in fact, made. This analysis, of course, is flawed: P's words were not asserting that she was making an offer, they were the making of the offer itself. Thus, the words were not really assertive, and as a nonassertion, do not constitute a “statement” within the prevailing definition of hearsay. The flaw is very real, of course, but at times, taking the students through an examination of why this is not a “statement” for purposes of the hearsay rule proves most dissatisfying. They simply refuse (at least at first) to accept that this kind of statement is not analytically hearsay.

23. FED. R. EVID. 801(c).
24. FED. R. EVID. 801(a).
When students are running into this conceptual difficulty with the "verbal acts" rule, I suggest they take a mental step back and consider the matter from a different and perhaps deeper perspective, one based on the relative places of evidence law and the law of contract. I try to develop in the classroom the following alternative explanation for the rule: the law of contract enforces certain oral arrangements. If the law of evidence were to exclude as hearsay a statement that contract law were to treat as an offer, the law of evidence would effectively invalidate one significant area of contract law. That is, by excluding proof of the offer, evidence law would make proving an oral contract virtually impossible. If such proof is impossible, oral contracts would be unenforceable whenever a dispute arises as to their existence.

To some extent this analysis oversimplifies contract theory. That is, whether the analysis is wrong likely depends on whether we adhere to a subjective or an objective theory of contracts.25 If the prevailing objective theory were used, the offer would in fact be proven by demonstrating that the words "I offer to sell you ten widgets for one hundred dollars" were spoken by P to D. And in that situation, P's own credibility when making the statement would not be in issue. All that need be shown is that she spoke words that would be understood by the reasonable person as the making of an offer. Under the objective theory of contract, then, the dangers brought about by the inability to test contemporaneously with the statement the declarant's sincerity, narrative ability and perception are minimal. The words spoken should not be treated as hearsay.

If, alternatively, the law were to embrace the subjective theory of contract, the actual intent and understanding of the parties at the time of the making of the "offer" would be much more important. In particular, at trial it would be crucial to understand whether P actually intended to be making an offer when she spoke the words "I offer to sell you ten widgets for one hundred dollars," whether she meant to make the offer that a superficial examination of the words she spoke would appear to support, whether at the time she made the statement she accurately recalled the facts of her own business and her relationship with D, and whether she was being sincere when she spoke the words. Viewed this way, her statement does raise hearsay dangers to a far greater degree than would be the case under an objective theory of contract, and our inability to cross-examine P contemporaneously with the making of the statement is more troubling. Classifying the statement as hearsay and

excluding it from evidence, then, would make more sense from an evidentiary standpoint, even if not from a contractual one.

Even given this possible oversimplification of contract law, the interference explanation is in some sense better than the more technical evidence law explanation because it represents an explicit recognition of the relative places of contract law and evidence law in the hierarchy of legal rules. In this situation, evidence law cannot exclude the words without interfering with important substantive goals of contract law. Therefore, it admits the evidence.\(^\text{26}\)

IV.

Some rules of evidence have only an indirect effect on substantive policy. One of the central provisions of the Federal Rules of Evidence grants the trial court great leeway in controlling the mode and order of interrogation of witnesses.\(^\text{27}\) Because each trial is different, decisions about such things as the order in which witnesses will be called and the subjects which may be explored on cross-examination must be made by the judge in context, keeping in mind the overall purposes of the rules. This rule most clearly implicates such purposes as lending order and clarity to the presentation of evidence, assuring fair and evenhanded treatment of the parties, preventing unwarranted intrusions into the private lives of parties and witnesses, and providing a forum for the satisfactory termination of the dispute. Standing alone, these purposes seem unrelated to the substantive rules giving rise to the trial or any other substantive policies. They are, for the most part, purposes related to the conduct of the trial itself—its orderly, efficient operation as well as the treatment of those who come before the court as parties or witnesses. Though such goals as the fair and humane treatment of parties and witnesses are hardly “non-substantive,” neither are they the reasons why the trial is occurring in the first place. The trial is overwhelmingly about external conduct, not about the rules governing the mode and order of presentation of evidence at that trial.

Again, however, this analysis must be taken at least one additional step. Though the primary purpose of the rule concerning the mode and order of interrogation of witnesses is directed to the conduct of the proceeding itself, the trial judge’s exercise of judgment in applying that rule

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\(^\text{26}\) Though raising the subtle conceptual problem discussed earlier, it might be preferable for the evidence law to treat words of independent legal significance as hearsay but subject to an exception. The purpose of the exception would be necessity. It would be more difficult, though not impossible, to rest the exception on the reliability of such statements.

\(^\text{27}\) FED. R. EVID. 611.
can clearly have some impact on the goals of the substantive law. The most obvious impact is on the goal of accurate factfinding. If evidence is presented in a chaotic, incoherent way, the jury will be far less able to determine accurately the events giving rise to the trial and inaccurate determinations of fact lead to inaccurate assessments of legal rights and responsibilities. So even the "mode and order" rule has substantive impact in the limited sense that it can be used to increase the chances of accurate assessment of the rights and responsibilities created by the substantive law.\textsuperscript{28}

Another set of evidence rules that has only an indirect substantive impact are those rules allocating functions between judge and jury. Though such provisions can be found throughout the Federal Rules of Evidence,\textsuperscript{29} one general rule governs most situations.\textsuperscript{30} That rule allocates most determinations of preliminary fact to the court, but leaves to the jury the determination of preliminary fact in the conditional relevancy context: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit the evidence upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."\textsuperscript{31}

This rule has a number of purposes unrelated to substantive policy. Most obviously, it clarifies the tasks of the various actors in the factfinding process. Given that the world does not divide neatly into "questions of law" and "questions of fact," the statement that the judge decides the former and the jury the latter obviously does not solve the problem in some situations. This rule is intended to clarify and distinguish which questions involving some factual determinations are for the court and which are for the jury. This makes the trial run more smoothly and predictably and helps to assure that similar trials in different courts are conducted in a relatively consistent way. Another purpose of the rule is simply to promote efficiency. By allowing the judge to decide certain facts preliminary to the admission of evidence, the judge can limit the

\textsuperscript{28} Another less tangible substantive impact has to do with the public perception of the trial's fairness. If people view trials as chaotic, imbalanced proceedings which will not offer them the opportunity to present their stories in a coherent logical way, they are less likely to trust the ability of the law to resolve their disputes, and thus less likely to bring (at least their civil) disputes to the courts.

\textsuperscript{29} See, e.g., \textit{Fed. R. Evid.} 602 (allocating to jury determination of whether witness had personal knowledge); \textit{Fed. R. Evid.} 901(a) (allocating to jury determination of whether document or other item has been authenticated); \textit{Fed. R. Evid.} 1008 (allocating to jury functions in "best evidence rule" situations).

\textsuperscript{30} \textit{Fed. R. Evid.} 104.

amount of time that will be spent offering and arguing certain kinds of evidence, and can shorten and perhaps simplify the trial.

Whether the rule allocating the decision-making power for the determination of preliminary facts has direct substantive impact is a more complex question that can best be examined with an example. Suppose X sues Y for personal injury following a collision between their two cars. Y was carrying a passenger in the back seat. X claims that after the accident, she got out of her car, walked over to Y’s car, asked what happened, and that a voice responded, “I don’t know what happened. I fell asleep before the crash.” If this statement was made by Y, it is relevant, as it would strongly suggest that Y was negligent, and it is admissible as a party admission. If, however, the statement was made by Y’s passenger, the statement appears not to be relevant because the passenger’s having fallen asleep would demonstrate her lack of personal knowledge about the accident. The statement would therefore have no impact on the determination of Y’s negligence. A crucial preliminary fact, therefore, arises in the context of conditional relevancy: determining who made the statement. Under the Federal Rules, this question should be left to the jury. No prejudice will occur to Y if the jury finds that her passenger made the statement. The jury will ignore the statement when determining responsibility for the accident. If the jury finds that Y made the statement, it will properly consider the statement along with all other relevant evidence.

Suppose, however, that the answer given by whichever occupant of the car responded was, “I don’t know what happened. The windshield was all fogged up.” In this situation, the information offered is relevant to the determination of responsibility whether it was made by Y or by her passenger. Yet, if made by the passenger, it is inadmissible hearsay unless it can be classified as a present sense impression or an excited utterance, neither of which is likely in the hypothetical. The problem is that if the jury were permitted to determine the preliminary fact of who spoke, and the jury decided that the statement was made by the passenger, the jury would likely have a difficult time ignoring the statement even though it would be instructed to do just that. This is a matter of human nature. Charged with the nearly impossible task of reconstructing a past event, and in the undoubted presence of conflicting testimony, the jurors will grope for any piece of information that allows them to reach

32. This hypothetical and the variant discussed next are drawn from John Kaplan, Of Mabrus and Zorgs—An Essay in Honor of David Louisell, 66 CAL. L. REV. 987, 1000-02 (1978).
an accurate conclusion of fact, and then an appropriate assessment of legal responsibility. How could the jurors ignore such a probative piece of information? If the hearsay rule is to be enforced, the judge must be the one to decide who spoke in this situation.\(^{34}\)

This is precisely the point for present purposes. The rule allocating functions between judge and jury has many purposes, but at least one central purpose is to help ensure that the rules of evidence themselves are enforced. If the hearsay rule is to be maintained, the judge must generally be the one who decides any preliminary facts necessary to satisfying an exception to the rule.\(^{35}\) But this analysis alone does not answer the question of the rule's true impact. To make that determination, we must examine the purposes of the evidentiary rule being protected by the allocation of certain factfinding to the judge. Here, that rule is the hearsay rule, and deciding what effect the allocation rule has thus requires asking why we maintain a hearsay rule. Obviously, that is a complicated question that must be answered as much with reference to history\(^ {36}\) as to current evidentiary theory. Nevertheless, the rule is designed in large part to ensure that at least a good deal of the evidence offered against a party, whether in a civil or a criminal case, is offered in person. This not only provides the person against whom the evidence is offered with a chance to face the witness in the courtroom to test the witness's memory, perception, narrative clarity and sincerity, but also provides the jury with the opportunity to judge credibility by viewing the witness at the time he or she makes the damaging statement.

All of this actually suggests at least two broad purposes for the hearsay rule, neither of which is likely to have direct substantive impact in the sense that it affects external conduct. The first is basic fairness to the party against whom the evidence is offered, a sense of fair play that comes from requiring the other side to produce its testimony in person rather than through reporting out-of-court statements or conducting a trial by affidavit. This purpose is largely related to the functioning of the adjudicatory process and, like rules governing the failure to sign a complaint or make an answer within a specified period of time,\(^ {37}\) it is only indirectly related to the substantive legal rules that created the claims.

\(^{34}\) While it seems clear to me that this would be a question for the court under \textit{Fed. R. Evid.} 104(a), Professor Kaplan wrote that "[t]he federal rules do not provide any guidance on the problem." Kaplan, \textit{supra} note 32, at 1000.

\(^{35}\) In the hypothetical whether the statement was a party admission of \(Y\) would actually turn on whether the statement was non-hearsay under the Federal Rules. For present purposes, this makes no difference.

\(^{36}\) See \textit{Cleary}, \textit{supra} note 21, § 244 for a discussion of the hearsay rule's history.

\(^{37}\) See \textit{supra} notes 6-7 and accompanying text.
and defenses governing the parties' rights and responsibilities. The second broad purpose of the hearsay rule is to promote accuracy in factfinding. To the extent that the hearsay rule requires a party to produce evidence in person, and to the extent that cross-examination and observation of witnesses' demeanor can test the reliability of their testimony, the truth is more likely to emerge. This second purpose, then, increases the odds that the parties' respective substantive legal rights and responsibilities will be determined accurately. This is also largely non-substantive, at least in its direct impact. Promoting accurate factfinding helps to assure that substantive rights are properly assessed but it does not directly affect external conduct. At least in the hearsay context, therefore, the rules allocating functions between judge and jury appear to operate primarily with reference to the adjudicatory process and only indirectly affect substantive policy.

V.

To this point my comments about the impact of evidentiary doctrine on substantive policy have been largely favorable because in most instances any impact of evidentiary doctrine has been to help further the goals of the substantive law. Even when evidence rules exclude relevant evidence and thus arguably impede the determination of truth, an argument generally exists that the rules serve other substantive goals. One evidentiary principle is more problematic. It is perhaps best represented by the case of Big Mack Trucking Co. v. Dickerson. 38 There, the wife and children of the deceased Dickerson brought a wrongful death action against Leday, a truck driver, and Big Mack, Leday's employer, after Leday's unattended truck, which was parked at a truck stop, rolled and crushed Dickerson. Plaintiffs claimed that Leday’s parked truck rolled because he had negligently failed to maintain the truck’s brakes. The theory of liability against Big Mack was respondeat superior and there was no dispute that at the time of the accident Leday was employed by Big Mack and was acting within the course and scope of his employment. The problem, however, was proof of negligence. The only evidence establishing the likely reason for the accident was the statements of Leday himself, who related to a superior and an investigating officer after the accident that he had been experiencing “air pressure troubles” and that he had not been keeping the proper air pressure in the braking system. Both Leday’s superior and the investigating officer were permitted, over

Big Mack's objection, to testify to these statements, and it was the admission of the statements that constituted the evidentiary issue in the case.\textsuperscript{39} The Texas Supreme Court reversed, holding that it was error to admit the statements.

There was no doubt that these statements would be admissible at trial against Leday. He was a party defendant, and his own words would constitute an admission and would be allowed into evidence.\textsuperscript{40} Under existing Texas law, however, the statements did not fit within any exceptions to the hearsay rule when offered against Big Mack.\textsuperscript{41} In reversing, the court noted:

Respondents assert that in an action against a servant and master, the master having been joined under respondeat superior, it is not necessary that the evidence proving the servant's negligence and proximate cause be competent evidence against the master in order to support a judgment against the master. The notion is that the master's derivative liability is imposed by law once the liability facts are proven by evidence competent against the servant. . . .

We cannot accept such a view. The suggestion is that with respect to proof of the servant's liability, which we deem an essential element of plaintiff's case against the master, the master loses the protection of the hearsay rule. Any reason which suggests that the master should lose the protection of that rule would also militate against the master's right to offer contrary evidence, to cross-examine plaintiff's witnesses, to object to evidence on grounds other than hearsay, or, indeed, even to plead the general denial which requires the plaintiffs to prove the servant's liability in the first place.\textsuperscript{42}

Purely as a matter of evidence law, this statement, although exaggerated, is essentially correct. As long as Texas evidence law did not exclude these statements from the hearsay rule or construe any excep-

\textsuperscript{39} Even though plaintiffs had a right to call Leday to testify, they did not call him. Had he been called, and had he offered evidence consistent with his previous statements, the evidentiary issue in the case would have been avoided.

\textsuperscript{40} See FED. R. EVID. 801(d)(2)(A). The rule classifies party admissions as non-hearsay. In contrast, many states treat such statements as hearsay but subject to an exception. See, e.g., CAL. EVID. CODE § 1220 (West 1966).

\textsuperscript{41} Big Mack, 497 S.W.2d at 289-90. The statements were not admissible as authorized or vicarious admissions; there was insufficient evidence to establish a foundation for the spontaneous explanation exception, and, because plaintiffs had not demonstrated that Leday was unavailable to testify, the statements were not admissible as declarations against his pecuniary interest.

\textsuperscript{42} Id. at 286-87.
tions to cover them when offered against Big Mack, admission of the statements seems improper. Big Mack is, indeed, as entitled to the protection of the hearsay rule as is any other party. But from another perspective, the court’s ruling is most troubling. The law of respondeat superior provides that an employer is liable for the tortious conduct of an employee committed in the course and scope of employment. This is perhaps the purest form of strict liability in the tort law today. Not only is the employer liable without fault but the employer need not have acted at all on the occasion in question in order to be held liable. The cause of action is simply as stated: plaintiff must only prove that the servant acted tortiously in the course and scope of employment.

If the only conduct that matters in determining the employer’s liability is that of the servant, and evidence is available that would be admissible when offered against the servant to prove that conduct, then why is that not sufficient to render it competent evidence against the employer? The only reason the evidence is not admissible against the employer is that the technical rules of evidence do not permit it. This seems to turn matters on their head, subordinating the substantive law to evidentiary rules. Put another way, if the law of evidence demands some evidence independently admissible against the employer before holding that the plaintiff has established a prima facie case against it, the law of evidence appears to be establishing substantial barriers to the vindication of the substantive policies that the rules of respondeat superior are designed to serve. The law of evidence, in other words, is making proof of the servant’s wrongdoing insufficient to establish the employer’s negligence when the law of respondeat superior says it is sufficient. If in fact the law of evidence is intended to serve rather than impede the goals of the substantive law, the decision in Big Mack seems wrong.

Of course, this argument could not be made if the evidence at issue were not admissible against the servant, as it was in Big Mack. An anomaly would arise if, by chance, Leday had not been made a party (in which case his statements would not have constituted admissions). In such a case, the evidence would be inadmissible against him, and there is reason to doubt the validity of a rule that depends on whether the servant happens to have been sued. But this is a problem unlikely to arise with any frequency. In most cases, the plaintiff is sure to make the servant a party defendant, and where the servant is not sued, the reason will most

43. See Restatement (Second) of Agency § 219 (1957).

often be unavailability (in which case the servant’s statements would probably be admissible as declarations against pecuniary interest).

There are two likely responses to this argument. The strongest response is a form of the “slippery slope” argument: if I am willing to violate evidence rules to help establish a claim in this situation, what principle could be used to distinguish this case from any case in which there is a paucity of admissible evidence to establish a party’s claim or defense? While I cannot dismiss concerns about line drawing once I am willing to breach evidentiary rules in one situation, I think I can in fact demonstrate that the problem raised by *Big Mack* is, if not unique, at least very unusual, and is in any event qualitatively different from other cases in which there is simply a lack of sufficient admissible evidence to reach the jury with a claim or defense. What differentiates this situation is that it involves an inextricable interconnection between the party against whom the evidence is technically admissible and the party against whom the evidence is offered. That interconnection is created by principles of substantive law, and it makes the conduct of one party legally significant to, and indeed controlling of, the legal status of the other party. In a very real sense, the two are treated as one. This is entirely different from a case in which there is simply a lack or shortage of evidence to prove a necessary proposition, and the line can be drawn there.

The second possible response to my argument actually draws on some of what I have already said. One purpose of the hearsay rule is to exclude evidence the reliability of which is difficult to ascertain. By restricting the hearsay exceptions in a manner which would not admit Leday’s statements when offered against his employer, the Texas courts were saying, in part, that the statements lacked sufficient reliability to merit their consideration by the jury. And to the extent that a jury is permitted to consider damaging evidence of questionable reliability, the chance of inaccurate factfinding (and resulting inaccuracy in the assessment of legal rights and responsibilities) increases. Thus, the argument goes, by excluding the evidence of Leday’s out-of-court statements, the court in *Big Mack* was actually serving rather than impeding the substantive policy of holding liable in situations such as these only those individuals who have acted negligently.

This argument carries some weight in the abstract. The rules admitting certain party statements (both against them and against others), after all, are not normally justified on the basis of reliability. Instead, they find their justification in the adversary process itself which, it is trusted,
will reveal the flaws in such statements. Because of the unpredictability of the adversary system, it was not irrational for Texas courts to decide to narrowly restrict the various admissions exceptions, even if more recent codes might have taken a more expansive view. Doing so, it would be argued, protects the value of accurate adjudication.

The problem is that this argument carries very little weight as applied to the facts of Big Mack. If Leday's statements had disavowed responsibility or otherwise exculpated himself or his employer, there would be significant reason to doubt their reliability, and a rational set of evidence rules could exclude them. But here the statements were highly inculpatory. There is no reason to believe Leday would have made them unless he truly thought he was at fault, and there is every reason to believe that at the time he made the statements, he was in a good position to assess the facts accurately. Though minor questions of his memory and of ambiguity might be raised, the reliability of these statements seems quite high. Thus, while the principle represented by Big Mack might be defended in some cases as increasing the likelihood of accurate decision-making, its application to this case is inappropriate.

The rationale of Big Mack might well be wrong even as applied to a case in which the reliability of the statements is somewhat more doubtful. Two things are at stake in such a situation. First is the respondeat superior rule itself. This is a true rule of substantive law; it establishes rights and obligations, and is designed at least in part to control external conduct. The second is the general goal of accurate adjudication. This is only an indirectly substantive goal; it does not establish legal rights, but

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45. "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission." Fed. R. Evid. 801(d)(2) advisory committee's note (citations omitted). Perhaps the result of Big Mack can be justified on the ground that while we can trust the adversary system to give Leday the opportunity to raise doubts about the validity of his own inculpatory statements (and we therefore do not mind that he could not cross-examine himself at the time he made the statements), we are not willing to force his employer to forego the right of contemporaneous cross-examination, at least as long as no hearsay exception applies.

46. These statements appear to fit within Federal Rule of Evidence 801(d)(2)(D), admitting "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D).

47. Because Leday's statements partly concerned past conditions and conduct, flaws in his memory might have existed. Without an opportunity to conduct a contemporaneous cross-examination, it might be difficult to reveal these flaws. Similarly, even though the statements seem reasonably clear on their face, it is possible that the statements did not accurately convey Leday's meaning. Such problems could be revealed more easily with contemporaneous testing than with cross-examination much later at trial.
only seeks to assure that such rights are judicially protected. Adherence to the respondeat superior rule suggests admission, while adherence to the goal of accurate adjudication suggests exclusion. If it is difficult to follow both rules in the same case, it is useful to assess which rule is more important and to adhere to that rule.

Put differently, we should ask whether greater harm would come from violating the basic rule of respondeat superior or the general goal of accurate adjudication. The former is the more fundamental rule, particularly given that accurate adjudication is more of an aspirational goal than a reality in many cases anyway, and more harm would come from violating the respondeat superior rule as long as there is reasonable evidence admissible against the servant to suggest tortious conduct in the scope of employment. In such a case, there will be some evidence of wrongdoing and additionally, the opponent can conduct at least some cross-examination and offer argument concerning the reliability of the evidence. This suggests that the risk of inaccurate adjudication is not that great in any event, and that it is at least theoretically possible that both goals can be satisfied.

In sum, the basic structural underpinnings of our legal system might well mandate that the Big Mack rule be rejected. Although rejecting that rule would arguably do violence to the doctrine of limited admissibility and perhaps to the hearsay rule as applied in that case, adhering to the Texas court’s result does more violence to the hierarchy of legal rules, arguably a more important set of principles than any individual rule of evidence. Rules designed primarily to facilitate the proof of substantive claims, assure fair treatment of parties and allocate functions among the decision makers in the trial cannot be elevated above the application of the rules that gave rise to the trial in the first place. And to the extent that the trial seeks not just to discover truth and vindicate formal legal rights but also to provide a forum for the satisfactory resolution of disputes, the rule of Big Mack must be viewed with great suspicion.

48. See FED. R. EVID. 105.
49. The hearsay rule as applied in Big Mack was that “[a]n agent’s hearsay statements should be received against the principal as vicarious admissions only when the trial judge finds, as a preliminary fact, that the statements were authorized [by the principal].” Big Mack Trucking Co. v. Dickerson, 497 S.W.2d 283, 287 (Tex. 1973), superseded by TEx. R. Civ. EVId. 801(e)(2)(D).
50. The Big Mack rule has not survived in Texas. Recently Texas adopted the new Rule 801(e)(2)(D), which admits the agent’s statement if it was made during the existence of the relationship and if it concerns a matter within the scope of employment even if it was not authorized by the employer. See TEx. R. Civ. EVID. 801(e)(2)(D). In Fajtik v. First Nat’l Bank, 752 S.W.2d 669 (Tex. Ct. App. 1988), the Texas appellate court held that the new rule
VI.

In this Essay, I have tried to explore the complex interrelationship between the rules that establish the rights and responsibilities of social actors and the rules that govern the ways in which those rights and responsibilities can be proven in our formal trial proceedings. I have only scratched the surface of this complex problem. For the most part, our evidence rules seem to work alongside substantive rules and to help further—or at least not impede—certain underlying goals of the law. At times, however, the law of evidence has been construed in a manner which elevates its status over that of the substantive law, and this is a result the wisdom of which merits further study. Perhaps this Essay can help point the direction for fruitful consideration of the relative places of our many systems of legal rules.

"'overturns the much criticized holding of [Big Mack].’" Id. at 672 n.3 (quoting Olin Guy Wellborn III, Article VII: Hearsay, 20 Hous. L. Rev. 477, 502 (1983)).