

# An Epistemological Argument Against Federal Rule of Evidence 403's Cumulative Evidence Clause

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*ABSTRACT: This Note presents an epistemological analysis of Federal Rule of Evidence 403's cumulative evidence clause, which provides for the exclusion of concededly relevant evidence where probative value is outweighed by the risk of needless cumulation. While courts vary in their application of the clause, it generally affords trial judges the discretion to bar admission of evidence that will not further assist the jury in reaching factual conclusions in light of what evidence is already on the record. This Note questions the wisdom of delegating this power to the bench. If the duty of a juror to form reasonable beliefs is best explained by an evidentialist view of epistemic justification, then it seems there can be no principled way for judges to determine whether a piece of legal evidence might bear an impact on juror fact-finding. The rule therefore contemplates an unwarranted judicial guesswork that risks exclusion of potentially important evidence, leaves juries ill-equipped to perform their duties, and may deprive the parties of fair and accurate verdicts. Amending or eliminating the rule to avoid these dangers would come at no cost to federal trial practice.*

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## I. INTRODUCTION

When it comes to determining how much evidence is necessary to prove a point at trial, there is a fine line between helpful corroboration and unnecessary excess.<sup>1</sup> A witness may corroborate a party's allegation as to the color of a stoplight at the time of a collision. Another witness may offer useful testimony to verify that account. A third, fourth, or even fifth witness has the potential to add persuasive appeal, especially if the opposing party plans to testify to the contrary. But how many witnesses can be put on the stand to testify about a traffic light before belaboring the point? Ten? Twenty-five? Where lies the threshold of sheer excess?

The Federal Rules of Evidence leave that question to the court.<sup>2</sup> Rule 403's cumulative evidence clause provides the trial judge with discretion to prohibit the admission of evidence where the probative value of that evidence is substantially outweighed by one of several risks, including the risk of needless cumulation. The practical necessity of such a rule is readily apparent: When the high stakes of a litigation rest in the hands of a layman jury, erring on the side of persuasive excess will always be in a party's interest.<sup>3</sup> Without a means for judicial intervention, federal courtrooms would bloat with hordes of witnesses and piles of documents. District courts would grow mired with needlessly long trials. Jury duty would become a full-time job, and parties already short of patience would be further stalled from receiving redress.

But while Rule 403's cumulative evidence clause boasts much practical appeal, this Note interrogates its latent danger: The cumulative evidence clause permits a court to preclude, without sound principle, the admission of relevant evidence. Regulating prejudicial, misleading, or time-wasting risks of trial evidence may be a job properly entrusted to the bench, but an epistemological examination of the roles of judge and jury shows that evaluating the purported "cumulativeness" of evidence is not. In authorizing

1. See *infra* Part II.B (sampling various appellate attempts to draw the line between corroborative and cumulative evidence).

2. See FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence.").

3. See *infra* Part II.A (exploring the rationale of Rule 403's cumulative evidence clause).

a court to rule upon cumulateness, Rule 403 presumes that judges can probe a jury's thoughts in a way that the epistemic underpinnings of the American jury trial suggest they cannot.<sup>4</sup> The rule contemplates an unwarranted judicial guesswork that risks exclusion of potentially important evidence, leaves juries ill-equipped to perform their fact-finding duties, and may deprive the parties of a fair and accurate verdict.<sup>5</sup> As mitigating the danger of Rule 403's cumulative evidence clause comes at no significant cost to federal trial practice, the clause should either be substantially circumscribed or eliminated altogether.<sup>6</sup>

## II. FEDERAL RULE 403

Federal Rule 403 provides that “[t]he 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>7</sup> Whereas the Federal Rules of Evidence deem relevant evidence generally admissible,<sup>8</sup> Rule 403 permits the exclusion of concededly relevant evidence when the prejudicial, confusing, or time-wasting nature of that evidence outweighs its probative value.<sup>9</sup>

The rule prescribes a balancing test for determining whether relevant evidence ought to be excluded on account of its adverse potential. However, the scale is not an even one: The risks posed by the evidence in question must “substantially” outweigh its relevance.<sup>10</sup> Whether the risks rise to this level is an evaluation left to the discretion of the trial judge.<sup>11</sup> This balancing act requires the judge to assess the probativeness of the objectionable evidence—that is, the ability of the evidence to make the proposition for which it is

4. See *infra* Part III.C (identifying the latent epistemic problem with the cumulative evidence clause, as well as its practical consequence).

5. See *infra* Part III.C.

6. See *infra* Part IV.

7. FED. R. EVID. 403.

8. See *id.* R. 402.

9. *Id.* R. 403 advisory committee's note to 1972 proposed rules (“[C]ertain circumstances call for the exclusion of evidence which is of unquestioned relevance.”).

10. *Id.* R. 403.

11. Janet Boeth Jones, Annotation, *Evidence Offered by Defendant at Federal Criminal Trial As Inadmissible, Under Rule 403 of Federal Rules of Evidence, on Ground That Probative Value Is Substantially Outweighed by Danger of Unfair Prejudice, Confusion of Issues, or Misleading the Jury*, 76 A.L.R. FED. 700, § 2 (1986) (noting further that, while it is typically understood that such discretion may only be checked by abuse-of-discretion review, an alternative “view has been expressed that this discretion must be applied evenhandedly, not excluding evidence by a defendant while permitting similar evidence by the prosecution”); see also 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:12 (4th ed. 2017) (“It is said that the trial court must have latitude to perform the weighing function, that her decision should be upheld even where the reviewing court would have weighed the factors differently, and that in this area a decision either way would pass muster on review.” (footnotes omitted)).

offered “more or less probable than it would be” in the absence of the evidence.<sup>12</sup> In requiring the trial judge to evaluate probativeness, the rule’s balancing test ascribes to the bench a proof-weighting role otherwise reserved for the jury.<sup>13</sup> Of course, the very aim of the rule is to protect this traditional jury function from the polluting forces of emotion, misinterpretation, and confusion.<sup>14</sup> Nevertheless, scholars have criticized Rule 403’s reshuffling of judge and jury responsibilities on Sixth and Seventh Amendment grounds.<sup>15</sup>

This Note does not aim to parrot these constitutional criticisms. Rather, it seeks to identify the particular concern that inheres in Rule 403’s language permitting the exclusion of cumulative evidence. The following Part examines the cumulative evidence clause, unpacks its motivations, and explores the interpretive difficulty it has presented to reviewing courts.

### A. THE CUMULATIVE EVIDENCE CLAUSE AND ITS MOTIVATIONS

The cumulative evidence clause permits a court to bar admission of evidence where its probative value is substantially outweighed by the risk of needlessly presenting cumulative evidence.<sup>16</sup> The clause finds its roots in

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12. FED. R. EVID. 401; *see also id.* R. 401 advisory committee’s note to 1972 proposed rules (discussing the two conditions of relevance—probativeness and materiality—and the difference therein).

13. *See* U.S. CONST. amends. VI, VII; JOHN HENRY WIGMORE, WIGMORE’S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW 527 (3d ed. 1942) (“When an issue has been submitted to the jury . . . the jury alone determines the weight, or total persuasive effect, of the evidence . . .”).

14. *See* Westfield Ins. Co. v. Harris, 134 F.3d 608, 615 (4th Cir. 1998) (explaining that Rule 403 provides for exclusion due to risk of prejudice when “there is a genuine risk that the emotions of the jury will be excited to irrational behavior” (quoting Morgan v. Foretich, 846 F.2d 941, 945 (4th Cir. 1988))); 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:13–14 (explaining that the rule is designed to prevent admission of evidence “[w]here it is likely . . . that the jury will mistakenly consider the evidence on a particular issue or against a particular party, even when properly instructed not to do so,” as well as to “set boundaries to trials in order to avoid unnecessary complexities and distortion”).

15. *See* Kenneth S. Klein, *Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1077–78 (2013); Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 1049 n.235 (2015) (“When courts reject claims of harm because evidence is merely cumulative or impeaching, they rely on their own assessment of the witness’s credibility, rather than giving the defendant the opportunity to have a jury assess the witness’s credibility in light of the additional impeachment information.”); *see also* Warner v. Kewanee Mach. & Conveyor Co., 398 U.S. 906, 907–08 (1970) (Black, J., dissenting) (“[The Seventh Amendment], as I understand it, means that questions of the sufficiency of the evidence are for the jury—not the trial judge . . .”). *But see* 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:12 (“At some extreme, the judge may take credibility into account in ruling on motions for judgment as a matter of law, and may exclude testimony that no reasonable person could believe, where it flies in the face of the laws of nature or requires inferential leaps of faith . . .”).

16. FED. R. EVID. 403.

common law authority.<sup>17</sup> In essence, it “is evidence law’s answer to the adage, ‘[e]nough is enough,’” providing a judicial safety valve by which a party’s attempt to admit excessive evidence in support of the same proposition can be cut short.<sup>18</sup> For example, in a recent Eighth Circuit drug-homicide case, the defendant alleged at trial that incriminating jailhouse informants could have fabricated their testimony regarding the defendant’s confession, as they had previously been exposed to details of the victim’s death.<sup>19</sup> Attempting to prove the theory, the defendant proposed that the jury hear fifteen additional witnesses who would testify simply to the informants’ prior knowledge about the details of the crime.<sup>20</sup> Finding that testimony from the defendant and another witness was enough to establish this point, the judge invoked the cumulative evidence clause and prohibited the additional witnesses.<sup>21</sup> The Eighth Circuit upheld the ruling.<sup>22</sup>

Intuitive as it may seem, the cumulative evidence clause contrasts with the law’s general deference to a party’s discretion in the presentation of a case.<sup>23</sup> Litigants are typically at liberty to put on as much or as little evidence

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17. See 22A KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5220 (2d ed. 2017) (“[T]he doctrine apparently existed at common law . . .”). Observing the dangers that the cumulative evidence clause seeks to mitigate, Bentham once wrote:

What number of witnesses shall a party be allowed to produce? Put a limitation anywhere upon the number, you lay the party under the necessity of leaving the mass of evidence on his side incomplete; you pave the way to deception and consequent misdecision. Put no limitation anywhere upon the number, you put it in the power of [the party] . . . to overwhelm his adversary with an indefinite load of testimony and the expense, vexation, and delay attached to it.

*Id.* (quoting JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 531 (1827)). Curiously, however, the Advisory Committee does not expressly anchor the cumulative evidence clause in common law authority as it does with 403’s other exclusionary grounds. FED. R. EVID. 403 advisory committee’s note to 1972 proposed rules (The committee’s note lists only “[e]xclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time,” among the doctrines “find[ing] ample support in the authorities.”). This is not to say that federal courts had never recognized cumulateness as a ground for exclusion prior to the inception of Rule 403. Federal courts long before 1975 had recognized the need for discretionary limitation of the number of witnesses who may testify to the same proposition. See, e.g., Southard v. Russell, 57 U.S. 547, 554 (1853) (stating that newly discovered evidence is insufficient to trigger the right to a new trial where that evidence would be merely cumulative); United States v. Baysek, 212 F.2d 446, 447 (3d Cir. 1954) (cumulative testimony as to defendant’s good character); Suhay v. United States, 95 F.2d 890, 893–94 (10th Cir. 1938) (cumulative testimony as to circumstances of a crime); Chapa v. United States, 261 F. 775, 776 (5th Cir. 1919) (cumulative testimony as to defendant’s good faith).

18. 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:15.

19. United States v. Street, 548 F.3d 618, 625 (8th Cir. 2008).

20. *Id.*

21. *Id.*

22. *Id.*

23. See Old Chief v. United States, 519 U.S. 172, 189 (1997) (“[T]he accepted rule that the prosecution is entitled to prove its case . . . rests on good sense. A syllogism is not a story, and a

as they feel is necessary to persuade a jury of the truth of a proposition.<sup>24</sup> Such permissiveness follows from the adversarial framework of the American legal system: A court is most likely to discover the truth if it permits both parties to try to prove the facts as they see them.<sup>25</sup> To some degree, then, the cumulative evidence clause curtails a party's traditional freedom to prove its case as it wills. Nevertheless, the provision does not stand as an arbitrary constraint on a party's right to proof—the cumulative evidence clause exists for its plain prudential benefits. For one, the rule guards against abuse of the adversarial system, preventing the “tireless or resourceful litigant . . . [from] wear[ing] down his opponent by repetitious proof or unnecessary waiting.”<sup>26</sup> The rule also combats against the wasting of judge and juror's time<sup>27</sup> and discourages the misleading use of excessive proof.<sup>28</sup> Interestingly, while each of these justifications seems to apply to other grounds for exclusion described in Rule 403, the structure of the rule suggests that “cumulative evidence” encompasses a class of evidence distinct from that which is merely time-wasting or delay-causing.<sup>29</sup> Identifying that class is a difficult task that has produced disparate interpretations across the circuits.

naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.”).

24. See 1 WIGMORE, *supra* note 13, § 1950 (stating that, except for an enumerated list of circumstances in which corroboration is required, “[n]o specific number or kind of witnesses is required for evidencing any material or relevant fact”).

25. See Kirsten DeBarba, Note, *Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial*, 55 VAND. L. REV. 1521, 1528 (2002) (highlighting as one of the advantages of the adversarial system “that adversaries will uncover more facts and transmit more useful information to the decision maker” (quoting 1 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 1.4(c) (2d ed. 1999))).

26. 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:15; accord BENTHAM, *supra* note 17, at 531.

27. 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:15 (“The court's time is a public commodity that should not be squandered.”); see also FED. R. EVID. 611(a)(2) (granting the court discretion to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . avoid wasting time”).

28. 22A GRAHAM, *supra* note 17 (“[A]s the evidence piles up, the risk of confusion increases and the probative worth of each new shovelful decreases.”). Jury instructions combatting misleading use of cumulative expert testimony are particularly illustrative:

You have heard evidence from medical experts for the plaintiffs and for all defendants. The fact that there were more medical experts testifying for the defendants should bear no weight in considering the quality of each expert's opinion. Cumulative evidence, that is stacking witness after witness to say the same thing, is no more valuable then [sic] one witness stating a credible opinion. You should consider the quality of the evidence and the testimony, not the quantity, in arriving at your decision.

Plaintiffs' Jury Instructions at \*15, *Bergeron v. Dartmouth Hitchcock Clinic*, 2005 Jury Instr. LEXIS 243 (N.H. Super. Ct. 2005) (No. 04-C-117); see also *Polec v. Nw. Airlines, Inc.*, 86 F.3d 498, 527 (6th Cir. 1996) (“[A] double helping of experts would be unfair.”).

29. See FED. R. EVID. 403 (listing “needlessly presenting cumulative evidence” as one among six independent risks in light of which relevant evidence may be excluded). Compare this to the language of the rule prior to its 2011 restyling, which provided that “evidence may be excluded

B. A SAMPLING OF INTERPRETATIONS

It is not hard to identify the kind of clear evidentiary overkill that Rule 403 seeks to prevent. More difficult is locating the fine line between admissible evidence that is justifiably probative and excludable evidence that is needlessly cumulative. “Not all evidence that is duplicative is therefore cumulative, and evidence should not be excluded on this ground merely because it overlaps with other evidence.”<sup>30</sup> Corroboration is a fundamental tool of persuasion, and trial attorneys oftentimes must put on duplicative evidence when witnesses, documents, or other forms of proof cannot stand alone to convincingly establish a fact.<sup>31</sup> But when does corroboration become cumulation? And how can a judge so distinguish when evidence aimed at proving the same point does not always take the same form?<sup>32</sup> Appellate review has generated a variety of definitions for “cumulativeness.” While an exhaustive survey exceeds the scope of this Note, a sampling of cumulative evidence opinions can reveal the diversity of interpretations amongst the circuits.

On what is perhaps the broadest notion of cumulativeness under Rule 403, evidence is cumulative and thereby excludable “when it adds very little to the probative force of the other evidence in the case.”<sup>33</sup> Under this view, the strength of previously admitted evidence does not uniquely bear upon the determination of cumulativeness. Rather, it is the relative strength of both the offered evidence and admitted evidence that will determine excludability under Rule 403. Weak evidence may be cumulative if it is offered in support of a proposition that has only been weakly established, and strong evidence may be cumulative if it is offered in support of a proposition that has already been strongly established. On the other hand, any evidence that bolsters the probative force of already admitted evidence will not be deemed cumulative

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if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.* R. 403 (2010) (emphasis added). Arguably, prior to restyling it was not clear whether cumulativeness presented an independent ground for exclusion or if it was merely a subset within of a broader class of time-wasting and delay-causing evidence, although the canon against mere surplusage suggests the former.

30. 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:15; *see also* United States v. Sosa, 208 F. App’x. 752, 758 (11th Cir. 2006) (“Rule 403 does not mandate exclusion merely because some overlap exists . . . .” (quoting United States v. De Parias, 805 F.2d 1447, 1454 (11th Cir. 1986), *overruled on other grounds* by United States v. Kaplan, 171 F.3d 1351 (11th Cir. 1999))).

31. 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:15 (“[S]ometimes it is reasonable for a party to insist that ‘one witness is good, but two or three will make my case much stronger, even though all will testify in a similar vein.’”).

32. 22A GRAHAM, *supra* note 17 (likening the task of assessing cumulativeness to that of “measur[ing] apples and orange juice” where multiple varieties of evidence—such as documents and testimony—are offered in support of the same point).

33. United States v. Williams, 81 F.3d 1434, 1443 (7th Cir. 1996). For an alternative articulation of this interpretation, see Jewell v. Life Ins. Co. of N. Am., 508 F.3d 1303, 1314 (10th Cir. 2007) (“Evidence is cumulative if its probative effect is already achieved by other evidence . . .”).

under this view. It therefore provides the greatest leeway for admitting corroborative evidence. For example, the Seventh Circuit upheld a district judge's decision to admit for impeachment purposes a witness's tape-recorded statement to police, which the witness had previously denied making.<sup>34</sup> Although two officers had already testified to the contrary, the court found admission proper in light of the "independent evidentiary value" of the recording for resolving the factual dispute between the witness and the officers.<sup>35</sup>

In contrast, a second view holds that evidence is cumulative where "enough" evidence has already been admitted in support of the proposition, so long as the jury has been "sufficiently apprised" of the proponent's theory.<sup>36</sup> In an illustrative Eighth Circuit homicide case, the defendant argued that she killed the victim in self-defense during a domestic dispute and sought to admit evidence establishing the abusive history of their relationship.<sup>37</sup> The defendant and seven other witnesses testified to this effect, but the trial judge barred testimony of an additional witness.<sup>38</sup> The appellate court upheld the exclusion on review, deferring to the district court's "considerable discretion."<sup>39</sup> It is important to note that under this "enough evidence" view, as opposed to the previous "additional probative force" interpretation, the strength of the offered evidence does not determine whether it is cumulative. Rather, cumulativeness will hinge solely on the strength of the evidence already on the record. Even if the offered evidence is only slightly probative with regard to the proposition it supports, the new evidence will be corroborative and not cumulative so long as the presiding judge believes that the proposition has not yet been established by more than "enough" evidentiary support, or that the already-admitted evidence has not yet "sufficiently apprised" the jury of the offering party's theory of the case. Accordingly, this view requires that a judge assess the jury's perception of the evidence on the record, a charge that will be specifically criticized below.<sup>40</sup>

A third—albeit dated—understanding of cumulativeness proposes that evidence should be excluded where it is offered for the purpose of bolstering already-admitted evidence which has not been challenged.<sup>41</sup> For example, in an early Ninth Circuit case, a bank robbery defendant sought to elicit

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34. *United States v. Kizeart*, 102 F.3d 320, 325–26 (7th Cir. 1996).

35. *Id.* at 325.

36. *United States v. Grant*, 563 F.3d 385, 393–94 (8th Cir. 2009).

37. *Id.* at 387–88.

38. *Id.* at 388.

39. *Id.* at 394.

40. *See infra* Part III.

41. *See United States v. Hearst*, 563 F.2d 1331, 1349–50 (9th Cir. 1977); *see also Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 251 (2d Cir. 2006) (excluding evidence as to a subcontractor's insurance, a fact to which the parties had stipulated); *United States v. Olivo*, 80 F.3d 1466, 1470 (10th Cir. 1996) (excluding documentary evidence of narcotics once found in prosecution witness's home in light of the witness's testimony acknowledging the drugs).



testimony from an expert who would opine that the defendant did not author damning tape recordings and manuscripts introduced by the government.<sup>42</sup> Because the defendant had already testified that he had not authored the statements, and because the government's sponsoring witness had "supported rather than contradicted" this proposition, the trial judge sustained the government's objection to cumulateness, and the appellate court affirmed.<sup>43</sup> Conditioning cumulateness on the unchallenged status of already-admitted evidence significantly narrows the scope of the cumulative evidence clause and constrains the trial court's discretion. The unchallenged-evidence view therefore minimizes the benefits of fairness, clarity, and judicial efficiency that the Advisory Committee sought to promote with the cumulative evidence clause.<sup>44</sup> Nevertheless, Parts III and IV of this Note argue that, at a minimum, a discretion-restricting standard should be adopted in place of broader views that provide nearly unguided discretion to the bench, calling upon a judge to determine whether a particular piece of evidence will make a proposition more convincing to jurors. This Note argues that broader views of cumulateness, such as the "additional probative force" and "enough evidence" views, run afoul of the underlying epistemological commitments of the jury trial and open a door to unprincipled evidentiary rulings.

### III. AN EPISTEMIC PROBLEM WITH A PRACTICAL IMPACT

Understanding the problem that underlies Rule 403's cumulative evidence clause requires a brief excursus into the realm of epistemology, the philosophical study of knowledge and belief.<sup>45</sup> This is because jurors are belief-makers: It is the purpose and prerogative of a jury in the American trial tradition to decide what is true and what is not.<sup>46</sup> In serving this role, jurors must form beliefs about the facts of a case based on the evidence presented to them.

That jurors are belief-makers is a fundamental premise of this Note, and yet it is not immune to debate. For instance, one might contend that rather than forming personal beliefs about the facts of a case, jurors are tasked with the unthinking, mechanistic enterprise of concluding, as if hypothetically, which facts are supported by the evidence and which facts are not. If this is in fact the job, it may be that jurors suspend their own beliefs as to the truth of

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42. *Hearst*, 563 F.2d at 1349–50.

43. *Id.* at 1350.

44. See *supra* notes 26–28 and accompanying text.

45. Alvin Goldman & Thomas Blanchard, *Social Epistemology* § 5.4, STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/epistemology-social> (last updated Apr. 28, 2015) ("Since a principal aim of [legal adjudication] is the determination of the *truth*, or the *facts* of the case, such undertakings are also plausibly understood as . . . epistemological in nature.").

46. STEPHEN N. SUBRIN ET AL., *CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT* 481 (4th ed. 2012) (stating that a jury's role, among other things, is "to decide what actually happened in the dispute").

the propositions over which the parties argue. But absurd implications follow the claim that the role of a juror is to calculate probabilities rather than to form beliefs. Consider a twelve-member jury which announces its unanimous guilty verdict in a first-degree murder trial. Before handing down judgment, the judge polls the jury, asking each member whether in light of the evidence he or she has concluded beyond a reasonable doubt that the defendant committed murder. Every juror confirms. The judge next inquires, "How many of you believe that this defendant murdered the victim?" No one raises a hand. To convict the defendant would escape all reason.

And so the premise appears sound that jurors in the American courtroom occupy the position of belief-makers. Certainly we do not place our confidence in a legal system that permits a jury to punish without actually believing in a defendant's guilt, or to compensate a plaintiff without actually believing in a defendant's liability. But then again, to merely call jurors belief-makers is to understate their charge. Jurors are not expected simply to form beliefs; they shoulder a greater burden. Jurors are *rational* belief-makers. Their duty comes with a particular set of instructions to hear the evidence, consider it with care, and ultimately form beliefs that are reasonable in light of the evidence and the inferences it entails.<sup>47</sup> It is this claim that the remainder of this Part seeks to establish and extrapolate.

#### A. EVIDENCE AND JUSTIFICATION

What it means to form a "reasonable" or "rational" belief is a question over which philosophers have spilled much ink.<sup>48</sup> In the epistemological parlance, the concept is known as "epistemic justification," and while writers feud over the precise meaning of that phrase, most will generally concede that epistemic justification is the property that "make[s] *probable* the truth of the proposition believed."<sup>49</sup> Epistemic justification is what marks the difference

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47. That the trial system demands a jury's reasonable—rather than arbitrary—fact-finding is a claim hardly requiring defense. Nonetheless, this expectation is made clear by the standard of review for sufficiency of the evidence. Despite the broad appellate deference granted to findings of fact at trial, a criminal conviction may be overturned for lack of sufficient evidence if no "*rational* trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis added). See also FED. R. CIV. P. 50(a) (permitting for judgment as a matter of law against a party if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue").

48. The concern can be observed as early as Plato's *Theaetetus*. See Richard Fumerton, *Theories of Justification*, in THE OXFORD HANDBOOK OF EPISTEMOLOGY 204 (2002).

49. *Id.* at 205. Fumerton clarifies that not all "justified" beliefs are epistemically justified. To the extent "that a patient's believing that she will get well often increases the chances of her recovery," she may be prudentially justified for believing that she will get well, even if that's probably not true. *Id.* Or, insofar as "a husband has a special *moral* obligation . . . to believe that his wife is faithful," he may be morally justified in holding that belief, no matter how unlikely it may be. *Id.* In contrast to these examples, only beliefs that share some kind of probable connection with the truth are those that will be deemed epistemically justified. *Id.* at 205–06

we sense between the predictions of a meteorologist and the predictions of a palm reader. While the beliefs of the former share a probable connection with the truth, the beliefs of the latter do not.

Philosophical scholarship has given rise to an abundance of competing theories that endeavor to explain what epistemic justification is and how it is achieved by believers.<sup>50</sup> Expounding and evaluating these many theories is well beyond the purview of this Note. Only one—a view called “evidentialism”—will be of particular concern here. This Note contends that evidentialism is the theory of epistemic justification embraced by the rules and conventions of the American jury trial. But before proceeding to defend that claim, it will be necessary to spend a few words explaining the evidentialist view.

Classic evidentialism holds that “Person S is [epistemically] justified in believing proposition p at time t if and only if S’s evidence for p at t supports believing p.”<sup>51</sup> So far as philosophical doctrines are concerned, evidentialism is far from a puzzler. In fact, the intuitive allure of the theory may be one of its most persuasive attributes.<sup>52</sup> It simply posits that a believer will be justified in believing the truth of a proposition where the believer’s evidence supports the truth of that proposition at the time the belief is formed.<sup>53</sup>

Of course, what it means for one’s epistemic evidence to “support” belief in the truth of a proposition is also open for debate. One standard view holds that evidence supports “a proposition only if the evidence that one has makes it more likely to be true than not.”<sup>54</sup> Others posit that a proposition may be

(noting, however, that some epistemologists alternatively “stress an alleged . . . probability as a key to distinguishing epistemic reasons from other sorts of reasons”).

50. For a survey of these theories, see generally RICHARD FELDMAN, *EPISTEMOLOGY* (2003); Fumerton, *supra* note 48.

51. Daniel M. Mittag, *Evidentialism*, INTERNET ENCYCLOPEDIA OF PHIL., <http://www.iep.utm.edu/evidenti> (last visited Jan. 20, 2018); see also Earl Conee & Richard Feldman, *Evidentialism*, in *EVIDENTIALISM: ESSAYS IN EPISTEMOLOGY* 83, 83 (2004) (advocating the slightly different formulation that person S’s “[d]oxastic attitude *D* toward proposition *p* is epistemically justified for S at *t* if and only if having *D* toward *p* fits the evidence *S* has at *t*”).

52. See Conee & Feldman, *supra* note 51, at 84 (“[Evidentialism] is not intended to be surprising or innovative. We take it to be the view about the nature of epistemic justification with the most initial plausibility.”).

53. By way of comparison, other views of epistemic justification do not deem evidentiary support to be the marker of a belief’s rationality. For example, reliabilist theories of epistemic justification hold that a belief is rational so long as it is produced by some process resulting in reliably true beliefs. See generally FELDMAN, *supra* note 50. Reliabilism is known as an externalist theory of epistemic justification, as it does not condition justification on a believer’s other beliefs or attitudes. Accordingly, a proponent of reliabilism would contend that, if forming beliefs about the location of underground water based on the movements of a dowsing rod is an objectively reliable means for forming true beliefs, then person S would be epistemically justified for holding a belief formed pursuant to that process, regardless of whether S had any other evidence regarding the location of water or the accuracy of dowsing.

54. Mittag, *supra* note 51, § 2(d). This construal of “support” is not unlike the law’s preponderance-of-the-evidence standard of proof: Where there is more evidence tending towards

supported by less than a preponderance of the epistemic evidence.<sup>55</sup> In any event, the precise meaning of epistemic “support” is largely immaterial for the purpose of assessing the cumulative evidence clause through an evidentialist lens.

More important is the question of what constitutes supporting “evidence.” To start, it must be understood that in the epistemological schema, “evidence” is not the evidence commonly described in the law:

When one compares philosophical accounts of evidence with the way the concept is often employed in non-philosophical contexts . . . a tension soon emerges. Consider first the kinds of things which non-philosophers are apt to count as evidence. For the forensics expert, evidence might consist of fingerprints on a gun, a bloodied knife, or a semen-stained dress: evidence is, paradigmatically, the kind of thing which one might place in a plastic bag and label ‘Exhibit A’ . . . [E]xamples such as these naturally suggest[] that evidence consists paradigmatically of physical objects . . . .

However natural such a picture might be, it is at least somewhat difficult to reconcile with historically prominent philosophical accounts of the nature of evidence.<sup>56</sup>

What Kelly describes as plastic-bagged, paradigmatic evidence will be referred to here as *legal* evidence. Legal evidence is what trial attorneys present to a jury to persuade them of the truth.<sup>57</sup> It consists of words and things in the world.<sup>58</sup> On the other hand, *epistemic* evidence exists in a believer’s head. Generally speaking, epistemic evidence includes all the information within the reach of one’s mind that can lend support to a particular belief.<sup>59</sup> This might include memories, sensory perceptions, logical inferences, suspicions, and other beliefs. Summarizing this category of mental contents, prominent

a proposition’s truth than there is evidence tending towards its falsity, the evidence in sum “supports” the proposition. See Conee & Feldman, *supra* note 51, at 83 (arguing that “[n]either belief nor disbelief is epistemically justified when our evidence is equally balanced”).

55. For example, those who take a contextualist approach to the notion of support argue that the degree to which epistemic evidence must “support” the truth of a proposition in order to confer justification is not always a bare 51%, and may depend on a believer’s social and intellectual context. See generally Stewart Cohen, *Knowledge and Context*, 83 J. PHIL. 574 (1986).

56. Thomas Kelly, *Evidence*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/evidence> (last updated Jul. 28, 2014).

57. See *Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining legal evidence as “[t]he collective mass of things, esp. testimony and exhibits, presented before a tribunal in a given dispute”).

58. See *id.* (additionally defining legal evidence as “[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact”).

59. Kelly, *supra* note 56 (describing Russell’s conception of epistemic “evidence as *sense data*,” Williamson’s definition of epistemic evidence as “the totality of propositions that one knows,” Conee and Feldman’s definition of epistemic evidence as “current mental states,” and the Bayesian view of epistemic evidence as “beliefs of which one is psychologically certain”).

evidentialist Richard Feldman has argued that evidence supporting a justified belief is any proposition that is within the believer's present mental access.<sup>60</sup>

Importantly, if epistemic evidence exists in a believer's mind, then "it is only *one's own* mental information that is relevant to determining whether one is justified in believing" a proposition.<sup>61</sup> This is simply to say epistemic evidence is inherently subjective. One epistemologist provides a helpful illustration:

When one has a headache, one is typically justified in believing that one has a headache. While others might have evidence that one has a headache—evidence afforded, perhaps, by one's testimony, or by one's non-linguistic behavior—it is implausible that whatever evidence others possess is identical with that which justifies one's own belief that one has a headache. Indeed, it seems dubious that others could have one's evidence, given that others cannot literally share one's headache.<sup>62</sup>

The inherent subjectivity of epistemic evidence also entails that a proposition one holds in mind cannot be evidence bearing on the epistemic justification of another's belief.<sup>63</sup> Understanding these subjective traits of epistemic evidence is crucial in identifying the danger that lurks beneath Rule 403's cumulative evidence clause.

#### B. EVIDENTIALISM AND THE JURY TRIAL

Having engaged in a brief exposition of the evidentialist position, one can now turn an epistemological eye toward the law. This Note posits that an evidentialist view of epistemic justification serves to explain the fundamental values for truth-seeking and rational belief-making embraced by the jury trial.

A first and most obvious indication of this evidentialist commitment is the jury trial's evidentiary design, by which jurors are charged with deciding questions of fact or liability in virtue of the evidence presented to them by the parties.<sup>64</sup> We expect these findings to reflect rational inferences drawn from the strongest evidence put on at trial, and we condemn as "rogues" those jurors who instead root their findings in grounds divorced from the

60. Richard Feldman, *Having Evidence*, in *EVIDENTIALISM: ESSAYS IN EPISTEMOLOGY*, *supra* note 51, at 219, 232–41 (positing that "S has p available as evidence at t [if and only if] S is currently thinking of p" and arguing at length that this view overcomes fatal objections endured by a variety of other conceptions of epistemic evidence).

61. Mittag, *supra* note 51, § 2(b).

62. Kelly, *supra* note 56, § 4.

63. Mittag, *supra* note 51, § 2(b) ("[M]y belief that Jones was in Buffalo at the time the crime was committed is not relevant to determining whether *you* are justified in believing that Jones committed the crime.").

64. See *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence . . .").

evidence.<sup>65</sup> To this end, legal evidence may be thought of as a toolset used to place within a juror's present mental reach the epistemic evidence that will guide the juror's belief-making process throughout the trial and into deliberations. Granted, the legal evidence offered during a trial does not comprise the exclusive epistemic evidence bearing on the justification of a juror's findings of fact.

[T]he trier [of fact] . . . must be assumed to have a fund of general information, consisting of both generalized knowledge and knowledge of specific facts, and the capacity to relate it to what he has perceived during the proceeding, as well as the ability to draw reasonable deductions from the combination by using the ordinary processes of thought.<sup>66</sup>

Evidentialist underpinnings may also be observed in the various procedures and conventions of a trial. To start, most federal courts have imposed rules governing jurors' ex parte exposure to the subject matter of a trial, some of which strictly prohibit communication about a case outside of the courtroom. On the evidentialist analysis, the theory of these rules is to safeguard jurors' belief-making processes from corruption by non-evidentiary, off-record rhetoric, emotional influence, and prejudice.<sup>67</sup> Additionally, many trial judges permit jurors to take notes during the presentation of evidence,<sup>68</sup> which may aid their retention of the evidence and thereby increase the number of presently accessible propositions within the introspective reach of each juror during their final belief-making efforts in deliberation. Yet another expression of jury-trial evidentialism can be found in the federal rules that provide for jury polling following the return of its verdict.<sup>69</sup> Some circuits

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65. See Molly McDonough, *Rogue Jurors*, AM. B. ASS'N J. (Oct. 2006), [http://www.abajournal.com/magazine/article/rogue\\_jurors](http://www.abajournal.com/magazine/article/rogue_jurors).

66. Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 272 (1944) ("Th[is] fund of general information must be at least as great as that of all reasonably well-informed persons in the community. [The factfinder] cannot be assumed to be ignorant of what is so generally accepted as to be incapable of dispute among reasonable men." (footnote omitted)).

67. See *United States v. Cox*, 324 F.3d 77, 86 (2d Cir. 2003) ("It is a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body." (quoting *United States v. Resko*, 3 F.3d 684, 688 (3d Cir. 1993))); see also Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 12 (2012) (identifying the dangers of jurors' use of social media during trial and arguing that jurors' premature deliberations "may undermine the public integrity of the judicial system . . . [which] 'depends upon public confidence in the jury's verdict'" (footnote omitted) (quoting *United States v. Siegelman*, 640 F.3d 1159, 1186 (11th Cir. 2011))).

68. Larry Heuer & Steven D. Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 NW. U. L. REV. 226, 227-29 (1990) (revealing that only 37% of 553 judges surveyed prohibit juror note-taking during trial).

69. FED. R. CIV. P. 48(c); FED. R. CRIM. P. 31(d).

regard the criminal jury poll as an absolute right.<sup>70</sup> Not only does this procedure ensure the unanimity of a verdict, but endowing individual jurors with the opportunity to voice their conclusions also confirms that each has formed a personal belief as to the liability of a defendant that is based on the juror's own subjective appraisal of the evidence.<sup>71</sup>

It bears mentioning that not all writers conclude that an evidentialist theory of justification best explains the epistemological commitments of the jury trial.<sup>72</sup> These thinkers will highlight that other conventions of the jury trial appear to cut against the evidentialist requirement that the justification of a juror's belief be based upon that juror's "own mental information" and nothing more.<sup>73</sup> For instance, during deliberations jurors are permitted to invade one another's belief-making processes by discussing, advocating, and questioning one another's assessment of the information presented during the trial. Similarly, during closing arguments, attorneys for both parties are permitted to interpret the legal evidence for the jury, drawing attention to its insufficiencies and advertising its strengths. Both closing and deliberation impart jurors with belief-making fodder that transcends the bare evidence presented during each party's case-in-chief.

Nevertheless, these practices do not betray an evidentialist explanation of jury-trial epistemology. While the information exchanged in closing and deliberation certainly does not qualify as *legal* evidence, it does constitute *epistemic* evidence—that is, additional propositions that may or may not support the juror's conclusion and confer justification under the evidentialist framework.<sup>74</sup> This objection therefore rests on the easy confusion of legal and epistemic evidence, as highlighted above. Whereas the federal courtroom is

70. See *United States v. Nelson*, 692 F.2d 83, 84 (9th Cir. 1982) ("Rule 31(d) grants the judge or any party the absolute right to have the jury polled after it has returned its verdicts." (citing *United States v. Edwards*, 469 F.2d 1362, 1366 (5th Cir. 1972))).

71. However, at least in the Ninth Circuit where a jury pull has been announced as an absolute right, a juror's assent to the verdict upon being pulled can only confirm by implication that she has undertaken a private, epistemically-sound assessment of the evidence, for "[n]othing in the rule permits the judge to ask the juror why he or she does not concur." *Id.* at 85.

72. For a coherentist analysis of evidentiary judgments, see generally Amalia Amaya, *Justification, Coherence, and Epistemic Responsibility in Legal Fact-Finding*, 5 *EPISTEME* 306 (2008). Generally speaking, the coherentist view of epistemic justification, as opposed to evidentialism, posits that a belief is justified so long as it coheres with the other beliefs of the believer. See *id.* at 307.

73. Mittag, *supra* note 51, § 2(b).

74. For example, consider the juror who is sitting quietly in a jury room, straddling the fence during deliberations in a murder trial. Her fellow juror pipes up: "How could anybody believe the defendant's story? Exhibit 5 shows that his fingerprints were on the gun!" The juror has seen the legal evidence to which her fellow juror refers, but she now has a new piece of evidence that will shade her belief-making—namely, the proposition that "At least one other person finds these fingerprints to be persuasive and inculcating." If this proposition remains within the present mental access of the juror, and if it lends support to the conclusion she reaches, then it will count as epistemic evidence contributing to the justification of that conclusion. *But cf.* Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 *VA. L. REV.* 1055, 1067 (1964) (arguing that one of the most important functions of a jury is its ability to "operate by *collective* recall").

committed to an evidentialist view of justification, evidentialism does not demand commitment to legal notions of evidence.<sup>75</sup>

C. *THE CUMULATIVE EVIDENCE CLAUSE'S ANTI-EVIDENTIALIST IMPLICATIONS*

Viewing the belief-making enterprise of the jury trial through an evidentialist lens, one may finally see just what is so rotten in Rule 403's cumulative evidence clause. In short, Rule 403's cumulative evidence clause defies the subjective nature of justification under the evidentialist framework, falsely presuming that a judge can weigh the epistemic evidence within a juror's mind and appraise the justification status of a juror's beliefs.

Contrasting the cumulative evidence clause with the other exclusionary grounds provided by Rule 403 illuminates this problem. Recall that in addition to permitting the exclusion of cumulative evidence, the rule provides that other relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, [or] wasting time."<sup>76</sup> While these exclusionary grounds are designed to achieve various ends of prudence or fairness,<sup>77</sup> they also serve an epistemological purpose. Namely, all of these provisions—along with perhaps every other exclusionary rule in the Federal Rules of Evidence—exhibit a kind of epistemic "paternalism" over a juror's belief-making process.<sup>78</sup> They authorize a court to keep from a jury's ears and eyes any evidence that might precipitate unjustified belief-making, all because jurors are prone to certain defects of human psychology that encourage quick-to-the-trigger belief-making when it is not otherwise clear that epistemic evidence supports such a conclusion.<sup>79</sup> Jurors are at risk of exercising

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75. See *supra* note 56 and accompanying text.

76. FED. R. EVID. 403.

77. See *supra* note 14 and accompanying text.

78. LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* 25 (Gerald Postema ed., 2006) (arguing that 403's exclusionary provisions "coddle juror by shielding them from evidence that some judge intuitively to be beyond their powers to reason about coherently"). Laudan is perhaps the most vehement among epistemological critics of courtroom evidence control. "[A] preferable alternative would be to admit *all* evidence that is genuinely relevant, accompanied . . . by an explicit reminder from judge to jury to bring their critical faculties to bear in evaluating the . . . evidence . . . and in keeping their emotional reactions . . . firmly in check." *Id.* at 24 (alteration in original). Curiously, however, his crusade against exclusionary rules seems to stop short of the cumulative evidence clause: "[R]edundancy aside, the only factor that should determine the admissibility . . . of evidence is its relevance . . ." *Id.* at 25. For a rebuttal against Laudan's criticism of epistemic paternalism in the law, see generally KRISTOFFER AHLSTROM-VIJ, *EPISTEMIC PATERNALISM: A DEFENCE* § 6 (2013).

79. See Brian Leiter, *The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence*, 1997 BYU L. REV. 803, 815 (1997) ("[R]ules of evidence governing admissibility . . . take into account the epistemic shortcomings of jurors, such as their susceptibility to confusion and prejudice or their generally modest level of intellectual ability.").



“affective, not cognitive, think[ing]”<sup>80</sup>—latching on to the visceral impact of prejudicial evidence, or rejecting confusing or lengthy presentations of evidence. The epistemic goal of Rule 403’s exclusionary clauses is to counteract these psychological realities by “set[ting] out norms for . . . admissibility . . . that are most favorable to the discovery of truth.”<sup>81</sup>

But the cumulative evidence clause is not an example of epistemic paternalism. Unlike the Federal Rules of Evidence’s other exclusionary provisions, the cumulative evidence clause does not merely permit the judge to weigh the danger that a piece of evidence may pose for a juror’s belief-making process.<sup>82</sup> Rather, it calls for the judge to evaluate *previously admitted* evidence and determine whether the sum of that evidence has already provided enough epistemic support to justify each juror’s belief in the proposition for which the new evidence is offered. On the evidentialist view, this is a sheer impossibility. Recall that evidentialism presumes epistemic justification will attach only if one’s belief fits the evidence one possesses at the time the belief is formed,<sup>83</sup> and that epistemic “evidence” includes only the relevant propositions within the believer’s present mental access.<sup>84</sup> “[O]nly *one’s own* mental information . . . is relevant to determining whether one is [epistemically] justified . . . .”<sup>85</sup> Short of telepathy, how possibly could a judge, in ruling on the cumulateness of a piece of evidence, determine with any degree of assurance whether the new evidence will “add[] . . . to the probative force of the other evidence in the case,”<sup>86</sup> or whether “enough”<sup>87</sup> evidence has already been introduced?<sup>88</sup> To do so would require the judge to gaze into the minds of an entire jury to evaluate whether the legal evidence already admitted in the trial has provided each juror the supporting epistemic evidence necessary to justify a belief in the truth of the proposition at issue. It

80. THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 376 (Richard A. Epstein et al. eds., 3d ed. 1992) (“Affective persons are emotional, creative, impulsive, symbol oriented, selective perceivers of information and base decisions largely on previously held attitudes about people and events.”).

81. Leiter, *supra* note 79, at 812.

82. See LAUDAN, *supra* note 78, at 20 (“In [excluding evidence for prejudice] the judge is called on to decide which of two quantities is greater: the probability of inferential error by the jury if the contested evidence is admitted . . . versus the probability of inferential error if the contested evidence is excluded . . . .”).

83. See Conee & Feldman, *supra* note 51, at 84.

84. See Feldman, *supra* note 60, at 232–33.

85. Mittag, *supra* note 51, § 2(b).

86. *United States v. Williams*, 81 F.3d 1434, 1443 (7th Cir. 1996) (articulating the Seventh Circuit’s cumulateness standard).

87. *United States v. Grant*, 563 F.3d 385, 393–94 (8th Cir. 2009) (stating the Eighth Circuit’s approach to reviewing cumulative evidence exclusions).

88. As discussed below, the same cannot be said where cumulateness is defined under an unchallenged-fact theory, such as the one employed in *United States v. Hearst*, 563 F.2d 1331, 1350 (9th Cir. 1977). See *infra* Part IV.A.

simply cannot be done, and so the judge's ruling is left to guesswork.<sup>89</sup> Rule 403's cumulative evidence clause thus demands an exercise of judicial discretion that is incompatible with the evidentialist view of what juries do and what legal evidence is for.

Defenders of the cumulative evidence clause will surely argue that it demands no impossible feat. After all, federal judges have extensive experience presiding over jury trials—does it not stand to reason that this experience would impart them with the ability to intuit when evidence is no longer useful to jurors?<sup>90</sup> This argument is unavailing. Intuition is just another name for guesswork, and even where a judge's guessing is good—that is, even where a seasoned judge happens to succeed in estimating what will be the bearing of more legal evidence on a juror's epistemic calculus—that guessing remains unprincipled. Certainly Rule 403's balancing test does not contemplate the exclusion of relevant evidence when a mere hunch is the sole epistemological basis for deeming the evidence cumulative.

So then, perhaps a better argument in defense of the clause would suggest that in determining whether an item of evidence is needlessly cumulative, the judge need not probe the minds of the jurors at all. Rather, the judge need only appraise *her own* epistemic evidence, evaluating whether the legal evidence already admitted in the trial has generated sufficient epistemic support to justify *her* belief in the truth of the proposition for which the new evidence is offered. The judge could then rule on the assumption that the jurors, having heard the same legal evidence, must also be justified in holding the same belief. Insofar as the judge conducts an accounting of the epistemic evidence within her introspective reach, arguably her decision is not arbitrary.

But unfortunately this defense is no more airtight than the first. For one, projection of a judge's own beliefs onto the members of the jury skirts dangerously close to the kind of unconstitutional judge-jury role swapping against which other writers have warned.<sup>91</sup> The claim that Rule 403's constitutional shortcomings validate its epistemic ones is naturally unconvincing. What's more, this argument rests on the erroneous assumption that two belief-makers who have heard the same legal evidence will be justified in forming the same belief. In actuality, two believers who have heard the same legal evidence do not necessarily hold the same epistemic evidence.<sup>92</sup> Many jurors enter the courtroom with expertise and experience that the judge does not share, and this knowledge may ultimately amount to epistemic

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89. The point adds an ironic dimension to the warning that "discretionary power to exclude cumulative evidence must be exercised in a discriminating fashion, and with wisdom." 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:15.

90. Thanks to Ryan Foley for proposing this counterargument during the revision of this Note.

91. See Klein, *supra* note 15, at 1077-79; Poulin, *supra* note 15, at 1049 n.235.

92. See *supra* note 56 and accompanying text.

evidence that affects the evidentialist justification calculus.<sup>93</sup> To one fact-finder, the word of five policemen may be less persuasive than the word of one priest. To another, the testimony of five priests might be refuted by an officer's. Regardless of whether a judge's personal evaluation of the admitted evidence confirms the judge's own justification in believing the proposition for which new evidence is offered, there remains no way for the judge to tell whether each member of the jury will be epistemically justified in the same conclusion.

There simply seems to be no way around the quandary. Short of distributing juror questionnaires that solicit an accounting of "every proposition"—every belief, every memory, every perception—that might come before a juror's mind during the course of a trial, judges cannot intersubjectively appraise the epistemic evidence of a jury with any expectation of accuracy. To the extent that Rule 403 permits judges to make findings as to the cumulateness of evidence, it stands as a departure from the evidentialist commitments of the jury trial.

It is worth clearly identifying the practical import of this problem. Should its epistemic inconsistency cast doubt upon the outcome of every case in which the cumulative evidence clause has ever been invoked?<sup>94</sup> Certainly not. When almost half a dozen government contractors testify that a public official was not accepting bribes, we can rest assured that the concurring testimony of 73 others probably would not have swayed the jury with regard to that fact.<sup>95</sup> It's the closer cases to where our concerns may properly be directed. Is photographic evidence of a safer design cumulative of an expert's testimony that a product could have been built for better protection?<sup>96</sup> Is testimony about particular instances of an employer's discriminatory behavior cumulative of statistical evidence showing the employer's history of discrimination?<sup>97</sup> Is a snapshot of two sisters cumulative of witness testimony that they bear a strong resemblance?<sup>98</sup> There's a fine line between

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93. See Kelly, *supra* note 56 (discussing the problem of background knowledge, a criticism of evidentialism contending that "two individuals who hold different background theories might disagree about how strongly a particular piece of evidence confirms a given theory, or indeed, about whether the evidence confirms the theory at all").

94. Thankfully, federal cases in which the cumulative evidence clause has been used to exclude evidence are rare to begin with, given that admission of objectionable evidence is favored under the Rule's "substantially outweighed" standard. See 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:12 ("The tenor of the language of Rule 403 supports [sparing exercise of the rule], since it contemplates admitting rather than excluding evidence when probative worth seems equally balanced against dangers . . .").

95. United States v. Shelton, 736 F.2d 1397, 1409–10 (10th Cir. 1984).

96. See Navarro v. Soaring Helmet Corp., 429 F. App'x 395, 399 (5th Cir. 2011).

97. See Harpring v. Cont'l Oil Co., 628 F.2d 406, 410 (5th Cir. 1980).

98. State v. Kent, 145 P.3d 86, 92 (N.M. Ct. App. 2006) (noting that photographs could reasonably have been cumulative of witness testimony).

corroboration and cumulateness,<sup>99</sup> and courts disagree as to where it lies.<sup>100</sup> A judge ought not be left to conjecture whether previously admitted legal evidence has already provided each juror with sufficient support to justify his or her belief in the truth of the proposition for which the new evidence is offered. These rulings risk the arbitrary exclusion of relevant evidence and may ultimately deprive parties of fair and accurate jury verdicts.

#### IV. ADDRESSING THE PROBLEM OF THE CUMULATIVE EVIDENCE CLAUSE

Drawing on the evidentialist thesis and the inherent subjectivity of epistemic evidence, this Note has endeavored to show that, in circumstances where challenged legal evidence straddles the line of corroboration and cumulation, judges are left to little but guesswork in deciding whether to exclude that evidence under Rule 403's cumulative evidence clause. From this problem, two questions naturally arise: First, can the danger posed by unprincipled cumulative evidence rulings be prevented? And, if it can, must a solution come at the cost of the prudential benefits the Advisory Committee sought to secure through the provision? This Note posits that the balance tips in favor of reform. The problem posed by the cumulative evidence clause can be resolved, and at no practical cost whatsoever.

##### A. SOLUTIONS TOWARDS RISK-FREE EVIDENTIARY RULINGS

There is a range of potential solutions to resolve the incongruity between the demands of the cumulative evidence clause and the epistemic commitments of the courtroom. The least radical solution would be for the Supreme Court to unify the wide variety of circuit court interpretations of "cumulateness" currently employed in reviewing exclusions of evidence under the clause.<sup>101</sup> In doing so, the Court could adopt a standard that removes from trial judges the impracticable responsibility of assessing jurors' beliefs, similar to the position adopted by the Ninth Circuit in *United States v. Hearst*.<sup>102</sup> Recall that the *Hearst* court upheld an exclusion of relevant evidence under Rule 403's cumulative evidence clause on the grounds that the adverse party had not challenged the proposition for which the excluded evidence was offered.<sup>103</sup> On the evidentialist account, this unchallenged-evidence standard appears to reason that a judge may presume jurors hold sufficiently supportive epistemic evidence to justify their belief in a proposition for which

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99. See 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:15 ("Not all evidence that is duplicative is therefore cumulative . . .").

100. See *supra* Part II.B.

101. See *supra* Part II.B.

102. *United States v. Hearst*, 563 F.2d 1331, 1349-50 (9th Cir. 1977).

103. *Id.* The Ninth Circuit's approach is not without its detractors. See 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:15 (citing *United States v. Hearst*, 499 F.2d 1003, 1004-05 (5th Cir. 1974) (suggesting that "even evidence that is relevant on a conceded point . . . is not necessarily cumulative or wasteful of time").

no adverse legal evidence has been offered. This reasoning rests on contentious grounds, as evidentialism does not necessarily support the conclusion that a mere lack of adverse epistemic evidence justifies one's belief.<sup>104</sup> It follows that an unchallenged-evidence standard for cumulateness may only safely permit exclusion of evidence offered in support of a formally stipulated fact.<sup>105</sup> But nevertheless, the solution rings hollow, insofar as it would place the burden to rectify improper exclusions on appellate review rather than by addressing the problem at the trial level.

Amendment is a second way to defuse the danger of the cumulative evidence clause. If the language of the clause were to be legislatively adjusted so as to remove the need for judges to appraise jurors' justification status, then the potential for a judge to mistakenly exclude consequential evidence would be significantly reduced. An intuitive revision following in the steps of the Ninth Circuit<sup>106</sup> would be to append language to the clause limiting its scope to evidence offered in support of an unchallenged proposition.<sup>107</sup> Such an amendment would bring the same benefits as the abovementioned judicial solution without requiring appellate courts to police trial rulings for epistemic misconduct. Further, an unchallenged-evidence amendment would provide trial judges with clear guidance as to the reach of the rule, restricting its application to narrow circumstances and limiting judicial discretion to the question of whether a piece of evidence survives 403's balancing test, rather than whether it is "cumulative." However, competent attorneys are unlikely in the first place to offer much evidence in support of an unchallenged proposition, so narrowing the application of the cumulative evidence clause in this way would effectually revoke the clause in whole. As a slightly less debilitating alternative, the clause could be revised to apply only in bench

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104. See JONATHAN E. ADLER, *BELIEF'S OWN ETHICS* 25 (2002). Adler discusses a favorite hypothetical among evidentialists: the belief "that the number of stars is even." *Id.* While one is unlikely to possess epistemic evidence that contradicts the proposition that there are an even number of stars in the universe, one is also not likely to have evidence that adequately supports that proposition to the extent that believing it would be epistemically justified. *See id.*

105. The reason for this is that stipulations stand as one of the trial system's rare deviations from its evidentialist epistemology. When parties stipulate to a proposition, they formally remove it from the jury's fact-finding province. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 677-78 (2010) ("[F]actual stipulations are 'formal concessions . . . that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.'" (alteration in original) (quoting KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* § 254 (6th ed. 2006))). Thus, jurors' epistemic justification is not implicated by barring admission of evidence as to stipulated propositions, for jurors are not invited to engage in belief-making about those matters. Rather, the jury will typically receive explicit instructions to accept stipulated facts as truth. *See* 3 KEVIN F. O'MALLEY ET AL., *FEDERAL JURY PRACTICE AND PRACTICE AND INSTRUCTIONS: CIVIL* § 102.11 (6th ed. 2011) ("You must accept a stipulated fact as evidence and treat that fact as having been proven here in court.").

106. *See supra* note 103 and accompanying text.

107. Perhaps: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence in support of a fact unchallenged by the opposing party."

trials.<sup>108</sup> Evidentialism would not pose a problem for findings of cumulateness in these proceedings, for a judge is fully capable of assessing the justification status of her own beliefs based upon the epistemic evidence presently accessible upon the judge's own introspection.<sup>109</sup>

A final possible solution would be simply to eliminate the provision altogether, removing cumulateness from the list of grounds for which relevant evidence may be excluded. Congress could amend Rule 403, or the Supreme Court could preempt the clause with a rule of its own.<sup>110</sup> Striking or preempting the cumulative evidence clause would revoke judges' discretion to bar admission of evidence based upon epistemic guesswork, as every item of relevant evidence not otherwise excluded by the Federal Rules could then have the chance to bear its epistemic effect on the belief-making process of each juror. Courts would no longer risk errantly excluding evidence that may indeed have shifted the justification balance of a juror's ultimate belief. While perhaps the most drastic measure, this solution offers the most effective and expedient means to protect federal juries in their role of justified-belief-making, and to return to litigants the important privilege of putting on all the evidence they deem necessary to prove a case.<sup>111</sup> Nevertheless, any of these proposed reforms would go far to resolve the problem posed by the current cumulative evidence clause. The remaining question is whether safeguarding the epistemic integrity of jury verdicts by eliminating the risk posed by unprincipled exclusion comes at too costly a price.

#### B. THE PRICE OF BETTER FACT-FINDING

While eliminating the cumulative evidence clause or substantially limiting its purview would effectively resolve Rule 403's epistemic conundrum and prevent judicial guesswork from blocking evidence from the jury's view, it cannot be forgotten that the cumulative evidence clause was drafted for a reason.<sup>112</sup> The clause guards against the squandering of judicial time and public resources,<sup>113</sup> prevents unfair or misleading persuasion,<sup>114</sup> and cuts short inimical, run-out-the-clock trial tactics<sup>115</sup>—all risks that the Advisory

108. For instance: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger . . . , or, in proceedings where all questions of fact will be resolved by the judge, needlessly presenting cumulative evidence."

109. See Feldman, *supra* note 60.

110. See FED. R. EVID. 1101(e); see also 28 U.S.C. § 2072(a) (2012) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . .").

111. See *supra* note 24 and accompanying text.

112. See *supra* Part II.A.

113. 1 MUELLER & KIRKPATRICK, *supra* note 11, § 4:15 (emphasizing that "[t]he court's time is a public commodity").

114. See *supra* note 28 and accompanying text.

115. 22A GRAHAM, *supra* note 17 (warning that evidentiary rules should not permit a party "to overwhelm his adversary with an indefinite load of testimony and the expense, vexation, and

Committee predicted would follow from permitting litigants to offer evidence on a point already proved. Does a court's need to prevent these abuses outweigh the latent danger of unprincipled exclusion? While a valid question of policy, it need not be answered. This is because other trial rules and party interests already adequately guard against the risks posed by the presentation of excess evidence.

For instance, when it comes to ensuring that judicial time is not wasted, the Federal Rules of Civil Procedure provide multiple devices to abbreviate or even prevent the waste of judicial resources through excessive admission of evidence. A motion to dismiss particular issues may prevent time-wasting discovery and fact-finding very early in the litigation process,<sup>116</sup> and a court may grant summary judgment on issues for which a litigant's proof is so abundant that there remains no genuine dispute of material fact, thus preventing the belabored and potentially cumulative introduction of evidence as to that issue.<sup>117</sup> Further, even on the eve of trial parties may resort to motions *in limine* to prevent the needless presentation of time-wasting evidence before a jury.<sup>118</sup> Where a question of fact has survived each of these efficiency-oriented procedural pinch-points, one must wonder whether a court's interest in accurate fact-finding has begun to outweigh its interest in saving time.<sup>119</sup> Nevertheless, even at trial the court remains armed with multiple tools for hastening the presentation of evidence, including Federal Rule of Evidence 611's broad grant of discretion to "exercise reasonable control over the *mode* and *order* of examining witnesses and presenting evidence so as to . . . avoid wasting time,"<sup>120</sup> and, most importantly, Rule 403's own "wasting time" clause.<sup>121</sup>

To the extent that admission of cumulative evidence may be used to mislead the jury or burden an adverse party, Rule 403's "unfair prejudice" and "misleading the jury" clauses provide alternative mechanisms for judicial intervention.<sup>122</sup> What's more, courts can rely on litigants themselves to keep abusive evidence practices in check. Parties have an incentive not to appear conniving or badgering during the presentation of evidence, as jurors' impressions of counsel are influential upon the ultimate disposition of a

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delay attached to it" (alteration in original) (quoting Jeremy Bentham, *Rationale of Judicial Evidence*, in 7 THE WORKS OF JEREMY BENTHAM iii, 531 (John Bowring ed., 1843)).

116. See FED. R. CIV. P. 12(b).

117. *Id.* R. 56(a).

118. See STEPHANIE HOIT LEE & DAVID N. FINLEY, FEDERAL MOTIONS IN LIMINE § 2:8-14 (2017).

119. See FED. R. CIV. P. 1 ("These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

120. FED. R. EVID. 611(a) (emphasis added).

121. *Id.* R. 403.

122. *Id.*

case.<sup>123</sup> The court can also expect competent opposing parties to highlight and clarify any misleadingly cumulative adverse evidence during closing arguments.<sup>124</sup> Finally, parties will always have the option to cut short abusive, misleading, or hampering use of cumulative evidence simply by stipulating to the fact for which it is offered.<sup>125</sup>

In light of these many alternative safeguards against the risks posed by free admission of cumulative evidence, it is clear that substantially narrowing or simply excising Rule 403's cumulative evidence clause would not come at too high a cost. In fact, it comes at little to no cost at all. Absent the cumulative evidence clause, the dangers of time-wasting, confusing, and harassing admission of evidence can be neutralized by other litigation mechanisms. There is nothing to lose in abandoning Rule 403's problematic bar against cumulative evidence.

## V. CONCLUSION

Despite its inexpert and esoteric venture into the field of epistemology, this Note has put forth a humble legal claim: Federal trial judges are not clairvoyant. They cannot know with any certitude what's on a juror's mind, or exactly how those thoughts will bear on the important factual questions about which jurors are called to form beliefs.<sup>126</sup> If it is true that the evidentialist view of epistemic justification best describes the epistemological commitments of the American jury trial, then the justification of a juror's beliefs is one thing a judge cannot judge.<sup>127</sup> And yet, this is precisely the kind of appraisal the court must make in excluding evidence under Federal Rule of Evidence 403's cumulative evidence clause.<sup>128</sup> Thus, insofar as it will come at no cost to judicial efficiency and courtroom fairness, the cumulative evidence clause should be either stricken from the language of Rule 403, or substantially narrowed so as to eliminate judicial guesswork in its application.<sup>129</sup>

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123. Steve M. Wood et al., *The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict*, JURY EXPERT, Jan. 2011, at 23, 27 (finding from a 572-juror survey that jurors' perception of credibility and organization in plaintiff attorneys' presentation of evidence was positively predictive of the jury's verdict).

124. See LAUDAN, *supra* note 78, at 24 (noting that in the adversarial system, "it falls to defense counsel to persuade the jury not to attach more weight to any specimen of inculpatory evidence than it duly deserves").

125. See *Old Chief v. United States*, 519 U.S. 172, 191 (1997) (holding that a party may stipulate to a fact in order to preclude admission of evidence as to that fact, so long as "there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence").

126. See *supra* Part III.B.

127. See *supra* Part III.B.

128. See *supra* Part III.C.

129. See *supra* Part IV.