DISFAVORED TREATMENT OF THIRD-PARTY GUILT EVIDENCE

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Forty-five states and ten federal circuits impose some type of disfavored treatment on a criminal defendant's evidence that a person other than himself committed the crime. When the defendant disputes that he is the perpetrator of the crime charged, such third-party guilt evidence is always relevant. But the so-called direct connection doctrine and its variants—collectively, the direct connection doctrines—impose additional burdens that a defendant must meet before this relevant evidence will be admitted. This disfavored treatment stems from discredited and abandoned concepts of evidence law and is out of step with the Federal Rules of Evidence and modern evidence codes. The direct connection doctrines wrongly transfer credibility questions from the jury to the judge and raise only minimal FRE 403–type dangers to justify their systematic exclusion. Moreover, the direct connection doctrines unconstitutionally interfere with the defendant's right to present a complete defense. They lack any non-arbitrary justification and cannot be logically reconciled with the fundamental principles that the prosecutor bears the entire burden of proof and that a jury may acquit based on only a reasonable doubt.

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INTRODUCTION

Forty-five states and ten federal circuits impose some type of disfavored treatment on a criminal defendant's evidence that a person other than himself committed the crime.[1] When the defendant disputes that he is the perpetrator of a crime whose occurrence is undisputed, evidence having any tendency to increase the likelihood that a third party committed the crime is relevant in the clearest sense.[2] But the so-called direct connection doctrine and its variants impose additional burdens that a defendant must meet before this relevant evidence will

1. *See infra* Appendix.
2. *See, e.g.*, FED. R. EVID. 401.

be admitted. This disfavored treatment stems from discredited and abandoned concepts of evidence law. As judicially created rules barring relevant evidence, the direct connection doctrines are out of step with the Federal Rules of Evidence (FRE) and modern evidence codes, which discountenance such judge-made exclusionary rules. But even if states were to codify them, the direct connection doctrines are unconstitutional. They interfere with the defendant's constitutional right to present a defense without offering a significant, non-arbitrary justification in policy.

In Part I, we identify the various forms the direct connection doctrines have taken. The direct connection doctrine is the most common name given to a judicially created rule restricting admission of a defendant's evidence of third-party guilt. But many jurisdictions impose very similar restrictions using different labels. Some do so under a categorical and systematic application of FRE 403 or its state-law analogues.[3] All these doctrines share the same fundamental core, which is to categorize a defendant's third-party guilt evidence as a special category of evidence and to apply restrictive tests to its admission.[4] Throughout this article, we will refer to the direct

3. FRE 403 gives discretion to the trial judge to "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." FED. R. EVID. 403. Every state evidence code in the nation has a comparable rule. *See* Linda J. Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99, 99 n.1 (2008) ("[A]ll states have adopted rules identical or similar to FED. R. EVID. 402 and 403." (citing JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE T-31 to -33 (Joseph M. McLaughlin ed., 2d ed. 2007))). For convenience, we will refer to all of these as "FRE 403–type" rules.

4. *See infra* Part II.B. The term "third-party guilt evidence" itself represents our choice from among various possibilities used by courts and commentators. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 319 (2006) (using the term "third-party guilt evidence"). It is also referred to as "third party culpability," *see, e.g.*, *Narrod v. Napoli*, 763 F. Supp. 2d 359, 373 (W.D.N.Y. 2011), "alternative perpetrator," *see, e.g.*, *State v. Ferguson*, 804 N.W.2d 586, 590–91 (Minn. 2011), or more creatively "aaltperp" (for "alleged alternative perpetrator"), *see Luna v. Commonwealth*, 460 S.W.3d 851, 880–81 (Ky. 2015); David McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest That Someone Else Is Guilty*, 63 TENN. L. REV. 917, 940 (1996) (coining the term "aaltperp"). This type of evidence is also referred to disparagingly as the "SODDI defense," an acronym for "some other dude did it." *See, e.g.*, Edward J. Imwinkelried, *Evidence of a Third Party's Guilt of the Crime that the Accused Is Charged with: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0*, 47 LOY. U. CHI. L.J. 91, 91–93 (2015). In our view, the tongue-in-cheek "SODDI," which not coincidentally rhymes with "shoddy," symbolizes the disrespect for a criminal defendants' rights that characterizes the direct connection doctrines.

connection doctrine and its variants collectively in the plural as the "direct connection doctrines."

We continue in Part I to survey the work of the handful of commentators who have criticized the doctrine. While we agree with their overall conclusions that the direct connection doctrines are unjustified and unfair to criminal defendants, we also note a significant shortcoming in this prior work. Most commentators who have focused expressly on the direct connection doctrines have fallen into the trap of accepting the premise that third-party guilt evidence is somehow a special case, different from other types of relevant evidence. Therefore, they typically suggest reform proposals that perpetuate the mistaken idea that third-party guilt evidence must be given some kind of special scrutiny by courts.[5]

In Parts II and III, we will show that the direct connection doctrines have no place in modern evidence law. The entire thrust of modern evidence codes over the past half century has been toward liberal admission of all relevant evidence in the absence of statutory or codified policy-based exclusions. Modern evidence law disfavors judge-made doctrines that disqualify categories of evidence from jury consideration or otherwise subject them to disfavored treatment. The direct connection doctrines cannot be justified either as a systematic application of FRE 403—which, indeed, is a contradiction in terms—or as a specialized foundation rule.

In Part IV, we will show that the direct connection doctrines are unconstitutional. In *Holmes v. South Carolina,*[6] the U.S. Supreme Court set up a sensible framework for analyzing the constitutionality of evidence-exclusion rules that restrict a criminal defendant's ability to present a complete defense: whether a non-arbitrary reason of sufficient weight exists for the rule in question. *Holmes*'s framework is sound, and it reached the right result in that particular case, striking down a particularly onerous version of the direct connection doctrine. But, it made two mistakes. First, the Court failed to distinguish generic evidence rules that apply to all evidence from doctrines or generic rules applied specifically and categorically to criminal defendants. These latter should trigger a heightened form of scrutiny. Second, the Court failed to examine critically the serious flaws with even the garden variety direct connection doctrines.

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5. *See infra* Part I.C. The one exception is Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 362 ("There is no good reason that anything more than the traditional balancing of probative value against countervailing factors ought to apply to third-party-perpetrator evidence offered by the defense."). We develop this idea in detail.

6. 547 U.S. 319 (2006).

I. THE DIRECT CONNECTION DOCTRINES AND THEIR CRITICS

In many, if not most, criminal trials, the factual dispute between the prosecution and defense does not concern whether a crime has been committed, but who has committed it. Where the defendant concedes having committed the alleged act, the defense will typically focus on the presence of a requisite mental state or on issues raised by affirmative defenses or mitigating factors. Those are not the cases we're concerned with. Our focus is on those cases where the central issue in the case is necessarily whether the defendant is the true perpetrator. The prosecution must prove the defendant's identity as the perpetrator beyond a reasonable doubt, while the defendant will try to cast doubt on that claim. Implicitly, a defendant contesting his identity as the perpetrator always implies that someone else committed the crime. In many cases, the defendant will try to go beyond that by offering affirmative evidence that a specific person other than himself is the true culprit.

A. The Problem of Disfavored Third-Party Guilt Evidence

Jury research has long established that jurors tend to base decisions on the presentation of a persuasive story, the strength of which is judged in part on the completeness of key story elements.[7] Jurors expect the parties to tell a story that has "narrative integrity."[8] Technically, criminal defendants can, and often do, present "reasonable doubt cases" that merely attempt to reduce confidence in the prosecution's narrative of guilt rather than offering a competing narrative.[9] But trial lawyers and scholars alike have recognized that reasonable doubt cases are comparatively ineffective in criminal trials, which are essentially "story battles."[10] As one experienced criminal defense attorney puts it, "if you have to use the term 'reasonable doubt'

7. *See, e.g.*, Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); *see also* John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right To Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1087–88 (2007).

8. Blume et al., *supra* note 7, at 1103 (quoting *Old Chief v. United States*, 519 U.S. 172, 183 (1997)).

9. Interview with John Pray, Clinical Professor of Law and Co-director, Wisconsin Innocence Project at University of Wisconsin Law School, in Madison, Wis. (May 11, 2015) (A reasonable doubt case is a "trial level strategy, using the standard as your main defense, basically the government hasn't sufficiently proven that your guy is guilty.").

10. *See* Blume et al., *supra* note 7, at 1089.

you've lost your case."[11] Where the central issue is the identity of the perpetrator, even a reasonable doubt case implies a story that someone else did it. But it is a story with a huge hole, and one likely to be ineffective.[12] The jury might speculate that, if this defendant did not do it, there should be at least some evidence suggesting that someone else did. Although such evidence may have been excluded by a pretrial ruling that the jury doesn't know about, the jury could draw a rational, but mistaken, inference that the absence of such evidence increases the probability of the defendant's guilt.

There is thus often a compelling need for a criminal defendant disputing his identity as the perpetrator to offer at least some evidence relevant to show that someone else committed the crime. This evidence can take many forms. Three common types of third-party guilt evidence are opportunity, motive, and propensity.[13] The defendant could offer evidence that the third party had opportunity to commit the crime by demonstrating that the third party had access to a weapon and was near the victim at the time of the crime.[14] Likely, the defendant will want to pair this with the third party's motive to commit the crime, such as revenge, jealousy, money, and the like.[15] Frequently, defendants will try to show the third party's propensity to commit the crime by offering other acts of the third party, such as past violent conduct or criminal charges.[16]

Third-party guilt evidence varies in strength as well as kind. Undisputed evidence that the third party was at the scene of the crime

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11. Interview with Steve Hurley, Partner, Hurley, Burish & Stanton, S.C., in Madison, Wis. (May 4, 2015).

12. *See* Blume et al., *supra* note 7, at 1103.

13. In his survey of third-party guilt cases, David McCord additionally lists three other varieties of third-party guilt evidence: "mistaken identity," "confession/physical evidence," and "other post-crime behavior." McCord, *supra* note 4, at 939. We do not focus on these, because they are less common and less affected by the direct connection doctrines. For example, if the third party confesses to the crime, or is in possession of physical evidence of the crime, the direct connection doctrines will likely be satisfied.

14. *See, e.g.*, *State v. Rosenthal*, No. 2013AP1847-CR, 2014 WL 2722772, at *4–5 (Wis. Ct. App. June 17, 2014) (defendant offering evidence that third party was in the area at the time of the victim's shooting and that the third party had access to a gun).

15. In *Rosenthal*, for example, the defendant offered evidence that the third party had an argument with the victim three days before the killing. *Id.* at *5.

16. Third party propensity evidence is known as "reverse 404(b)" evidence, because it is the defendant, not the government, who offers "other acts" evidence under Federal Rule of Evidence 404(b). *See generally* Jessica Broderick, Comment, *Reverse 404(b) Evidence: Exploring Standards when Defendants Want To Introduce Other Bad Acts of Third Parties*, 79 U. COLO. L. REV. 587, 591–92, 594 (2008) (discussing the *Huddleston v. United States*, 485 U.S. 681 (1988), holding on FRE 104(b)).

and that the third party had motive is relatively strong.[17] Weaker evidence may be limited to motive or opportunity alone. In one case, a third party merely knew the victim and had the same first name as the victim's identified attacker.[18] Much third-party guilt evidence falls in the middle, like a defendant's offer of proof that (1) the third party's fingerprints were found on the victim's car; (2) the third party lied to the police about not knowing the victim; (3) the third party had a related prior offense; and (4) the third party was known to carry a shotgun in his vehicle.[19]

The direct connection doctrines exclude virtually all weak, and much strong, third-party guilt evidence. This disfavored approach to what may be a very important type of evidence to criminal defendants presents two core problems. First, sometimes seemingly weak evidence does not have a low probative value because the defendant has a great need for it.[20] Second, once a direct connection doctrine is in place, there is a heightened risk of excluding very strong third-party guilt evidence where the third party is in fact guilty.

1. STEVEN AVERY

The first problem is illustrated by *State v. Avery*,[21] the murder case made (in)famous by the recently aired Netflix documentary *Making a Murderer*.[22] Steven Avery, a forty-four-year-old man from Manitowoc, Wisconsin, had already spent eighteen years in prison for a wrongful conviction from a 1985 rape. Conclusively proven innocent through DNA testing in 2003, Avery was in the midst of a civil suit against several Manitowoc police and prosecutors when, in November 2006, he was charged with a murder that seemed to have occurred in the general area of his property. The State's theory of the case was that Avery lured the victim, twenty-five-year-old part-time photographer Teresa

17. *See State v. Wilson*, 864 N.W.2d 52 (Wis. 2015) (excluding third-party guilt evidence under strict legitimate tendency standard despite undisputed evidence that the third party was at the crime scene at the time of the murder and had motive to commit the murder). The third-party guilt evidence in *Holmes v. South Carolina* was also strong. 547 U.S. 319, 232 (2006).

18. *See State v. Freeman*, 76 P.3d 732, 741 (Wash. Ct. App. 2003), *aff'd,* 108 P.3d 753 (Wash. 2005) (victim identifies shooter as childhood friend Michael; mother originally informs police that her son identified Michael Williams, when son really meant the defendant, Michael Freeman).

19. *State v. Nash*, 339 S.W.3d 500, 514–15 (Mo. 2011).

20. *See* FED. R. EVID. 403 advisory committee's note (requiring courts to balance "the probative value of and need for the evidence against the harm likely to result from its admission").

21. 804 N.W.2d 216 (Wis. Ct. App. 2011).

22. *Making a Murderer* (Netflix 2015).

Halbach, to his family's salvage yard with a photography assignment, murdered her with the help of his nephew, Brendan Dassey, and then burned her body and buried her remains in his backyard. While the State had contended in highly publicized pre-trial press conferences that this was a sex crime, involving a brutal rape prior to the murder, the State dropped that charge at the start of the trial and offered no evidence of rape.[23]

At trial, the State presented a circumstantial case against Avery consisting largely of five or six items of physical evidence found in or near Avery's trailer: the victim's SUV itself; traces of Avery's blood inside the SUV; traces of Avery's DNA on the hood latch to the SUV; the key to the SUV, found in Avery's bedroom; burned bone fragments of the victim; and a bullet found in Avery's garage which purportedly had rendered the fatal gunshot to the victim.[24]

But the evidence was dubious. The defense presented strong evidence that the bones had been moved from the actual burn site and argued that it was implausible that Avery would have moved the bones toward his own residence if he were the killer. The SUV key had not been found in several prior searches of Avery's bedroom, and the defense presented evidence strongly suggesting that the key was planted by a detective who had been accused of misconduct in the civil suit; this same officer would have had access to numerous DNA samples of Avery through the search and seizure of toiletries from Avery's bathroom. The defense presented evidence consistent with the possibility that this same detective planted Avery's blood in the vehicle: the detective had access to a vial of blood from the 1985 rape case, and there was evidence that the vial had been tampered with in the clerk's office where it was non-securely stored.[25] The defense presented evidence that Avery's DNA was negligently transferred to the hood latch by an investigating officer who opened the hood after unsuccessfully attempting to start the SUV using the key with Avery's planted DNA on it.[26] The bullet had Avery's DNA on it but not the victim's; and there was strong evidence questioning whether Avery's DNA was really on the bullet, since the lab test was tainted.[27]

At the same time, there was a disturbing absence of the sort of evidence that one would expect to find had Avery been guilty. Aside

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23. *Id.*

24. *Id.*

25. *Id.*

26. *See* Closing Argument of Defense Attorney Jerome Buting, Jury Trial Transcript, Day 23, at 196–97, *State v. Avery*, No. 2005-CF-381 (Wis. Cir. Ct. Manitowoc Cnty. Mar. 14, 2007).

27. *Making a Murderer* (Netflix 2015).

from the bone fragments and the SUV, which may have been moved, there were no traces of the victim's blood or DNA anywhere on the Avery property, such as Avery's bedroom or garage.

Despite a strong case of reasonable doubt stemming from faulty and possibly fraudulent investigative procedures and evidence, the jury convicted Avery.[28] Missing from the defense case was an innocence narrative suggesting alternative suspects. At trial, the jury was left asking, "If not Steven Avery, then who?" Prior to the start of the trial, Avery's defense team had moved to offer evidence suggesting that other named persons—various customers and family members who visited or lived on or near the salvage yard—could have murdered Teresa Halbach.[29] The defense proposed to name one or more such persons, introduce evidence of their opportunity and suspicious behavior, and argue that these persons would have known that Avery would be easy to frame for the crime.[30] Given Steven Avery's ongoing dispute with the Manitowoc sheriff's department, the real culprit could well know that law enforcement would like nothing better than to be able to show Avery guilty of a new crime.[31]

But the trial court granted the prosecution's motion to exclude all evidence of third-party guilt.[32] Expressing worry about "[t]he danger of degenerating the proceedings into a trial of collateral issues," the court excluded the defendant's third-party guilt evidence, relying on Wisconsin authority requiring that a defendant must offer evidence of the third-party suspect's motive to commit the crime, in addition to his opportunity, and a "direct connection" to the crime.[33] The court ruled

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28. *Id.*

29. *See* Defendant's Statement on Third-Party Responsibility at 9–11, *State v. Avery*, No. 2005-CF-381 (Wis. Cir. Ct. Manitowoc Cnty. Jan. 10, 2007), *available at* http://www.stevenaverycase.org/wp-content/uploads/2016/02/Defendants-Statement-on-Third-Party-Responsibility.pdf.

30. *Id.*

31. *Id.* The defendant's motion papers mentioned several names, but focused on a few leading alternative suspects. One in particular, according to the defendant's motion, who had been placed near the crime scene around the time of Teresa Halbach's death, had behaved suspiciously: he did not go to work on the day of the murder and was a "nervous wreck" around the time of Avery's arrest; told a coworker that blood on his clothes had gotten there from being mixed up with others' laundry; and tried to sell a .22 rifle—the type of gun found to be the murder weapon—after Teresa's death. *Id.*

32. *See* Decision and Order on Admissibility of Third Party Liability Evidence at 15, *State v. Avery*, No. 2005-CF-38 (Wis. Cir. Ct. Manitowoc Cnty. Jan. 30, 2007), *available at* http://www.stevenaverycase.org/wp-content/uploads/2016/02/Decision-and-Order-on-Admissibility-of-Third-Party-Liability-Evidence.pdf.

33. *See id.* at 9 (citing *State v. Denny*, 357 N.W.2d 12, 17 (Wis. Ct. App. 1984)).

that the evidence of motive was absent here.[34] The ruling was particularly ironic given that the prosecution offered no evidence that Avery had a motive to commit the crime. Avery was therefore thrown into a murder trial, a story battle for his life, without an affirmative narrative of his own. The jury was left to wonder why Avery was not explaining what really happened to Teresa Halbach. Jerome Buting anticipated this very problem:

> We're really worried that the jury might think "God you know, can we really acquit this man when we don't know," when we can't tell them who we think did it? That's gonna be on a human level, the hardest thing I think, and the judge has really tied our hands on that.[35]

The *Avery* trial thus illustrates the potential limitations of even a strong case of police misconduct and tainted evidence toward producing reasonable doubt in the minds of jurors when no third-party guilt evidence is presented.

2. TIMOTHY COLE

While Steven Avery's actual guilt or innocence remains in doubt, there is no doubt about the innocence of Timothy Cole. His case powerfully illustrates the related, second problem, the risk of excluding strong third-party guilt evidence when the third party is in fact guilty, and the defendant in fact innocent. In 1985, a Texas Tech University student named Michele Murray was getting into her car on campus when a man approached her, asking to borrow jumper cables.[36] Within a few seconds, the man shoved her into the car, drove her to a secluded area a few miles away, and raped her. Murray reported the crime immediately after, describing her attacker as being a black man between 5'6" and 5'9" tall, "bug-eyed," and a smoker. After a botched photo array, Murray tentatively identified Texas Tech student and U.S. Army veteran Timothy Cole as the rapist.

At trial, Cole's counsel repeatedly tried to enter third-party guilt evidence that a violent felon named Jerry Johnson committed the rape.[37] The district attorney ridiculed these attempts and the evidence was

34. *Id.*

35. *Making a Murderer: The Last Person to See Teresa Alive* (Netflix 2015) (27:30–27:50).

36. *In re A Court of Inquiry*, No. D1-DC 08-100-051, at 3 (Tex. Dist. Ct. Travis Cnty. Apr. 7, 2009), *available at* http://ipoftexas.org/wordpress/wp-content/uploads/2009/05/cole-opinion-040720091.pdf.

37. *Id.* at 8.

"largely blocked by the trial court on the ground that facts pointing to the existence of another suspect were 'irrelevant.'"[38] Cole was convicted and sentenced to twenty-five years in prison. Steadfastly maintaining his innocence, Cole continued to fight his case until his appeals ran out. In 1999, Cole suffered an asthma attack and died in prison.[39]

Waiting until after the statute of limitations had run on Murray's rape, Jerry Johnson began attempting to contact Cole in 1995. He was not successful until 2007, eight years after Cole's death, when he contacted a reporter from the *Lubbock Avalanche Journal*. Unaware of Cole's demise, he wrote a letter to Cole as well as the Innocence Project of Texas. Johnson gave the Innocence Project a confession that could only have been given by the true rapist. Later, DNA evidence confirmed that Jerry Johnson, and not Timothy Cole, raped Michele Murray.[40]

Thus, the disfavored treatment of third-party guilt evidence goes beyond abstract concerns about fairness and due process, and can go to the heart of our cherished assumptions about tilting the criminal adjudication system to protect the innocent.

B. The Direct Connection Doctrines

Our concern in this article is with any doctrine by which a court systematically disfavors third-party guilt evidence compared with any other relevant evidence in a criminal case. The classic version of such an approach is "the direct connection doctrine." In its typical formulation, the doctrine holds that "evidence of the third party's guilt is admissible only if the defense can produce evidence that 'tend[s] to *directly connect* such other person with the actual commission of the crime charged.'"[41] While several jurisdictions continue to adhere to the classically formulated, full-bore direct connection doctrine, many others use different doctrinal tests to reach the same, or similar, results. Some even do so under the guise of purportedly using the case-by-case balancing test of FRE 403 and its state-law analogues. What all these approaches have in common is that they (1) isolate third-party guilt evidence as a special category of relevant evidence and (2) impose a higher barrier to admission of this third-party guilt evidence than is placed on other relevant evidence. For convenience, and to emphasize

38. *Id.*

39. *Id.*

40. *Id.* at 8–9.

41. *Rogers v. State*, 280 P.3d 582, 586 (Alaska Ct. App. 2012) (emphasis added) (quoting *Marrone v. State*, 359 P.2d 969, 984 n.19 (Alaska 1961)).

this fundamental commonality, we refer to all these doctrines—including this misuse of FRE 403–type rules—as "the direct connection doctrine*s*" (plural).

Courts following what we call the full-bore direct connection doctrine apply a sufficiency test to exclude relevant third-party guilt evidence. Courts using what we call a systematic 403 approach categorically disfavor third-party guilt evidence under the guise of FRE 403–type balancing.

1. POLICY JUSTIFICATIONS FOR DISFAVORED TREATMENT

The systematic disfavored treatment of third-party guilt evidence has questionable underpinnings in history and policy. Professor David McCord has traced the original direct connection doctrine to an 1833 North Carolina case, *State v. May*,[42] which excluded third-party guilt evidence on two grounds.[43] One was a doctrine categorically excluding all "other acts" evidence, and the other was a general distrust of a party's ability to fabricate certain types of hearsay.[44] A rule supported by retrofitted policy justifications after its original rationale has eroded should be viewed with suspicion. Such is the case with the direct connection doctrines, since neither of *May*'s twin rationales retain vitality under modern evidence doctrine.

To begin with, *May*'s general distrust of party testimony is part and parcel of a superseded common-law approach to witness competency. Before the twentieth century, many courts limited trial testimony to that of white, Christian non-felons. Testimony from non-whites and atheists was widely excluded on the belief that such

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42. 15 N.C. (4 Dev.) 328 (1833).

43. McCord, *supra* note 4, at 921–23 (citing *May*, 15 N.C. (4 Dev.) 328).

44. The doctrine of "*res inter alios acta*" held that events occurring at a time different from the time in issue or involving non-parties to the underlying events are immaterial and commonly not relevant. McCord, *supra* note 4, at 923. This doctrine is no longer good law. The U.S. Supreme Court seemingly approved this doctrine in dicta in *Alexander v. United States*, 138 U.S. 353 (1891), in which the Court noted "a certain discretion on the part of the trial judge" to exclude evidence of other acts of third parties if "they were so remote or insignificant as to have no legitimate tendency to show that" the third party "could have committed" the crime. *Id.* at 356. But the Court "f[ou]nd it unnecessary to determine whether there was such error in ruling out this testimony as to require a reversal." *Id.* at 357. In any event, the *res inter alios acta* doctrine has been supplanted in modern evidence law, which does not view past specific acts by non-parties as categorically irrelevant, excluding them only if offered to show character. *See* FED. R. EVID. 404(b).

The *May* court also stated that the evidence "is too uncertain, and too easily fabricated falsely for the purpose of deceiving, to be relied on or acted on in a Court." *May*, 15 N.C. (4 Dev.) at 333.

testimony was unreliable.[45] Most importantly for third-party guilt cases, "all parties to litigation, including criminal defendants, were disqualified from testifying because of their interest in the outcome of the trial. The principal rationale for this rule was the possible untrustworthiness of a party's testimony."[46] But FRE 601 abolished the common law rules of witness competency; the rule "culminat[ed] over a century of rethinking the law in this area."[47] Judges and legal scholars found that the common law witness competency rules blocked the pursuit of truth by disqualifying whole categories of witnesses who could provide relevant evidence.[48] In fact, the witnesses disqualified were often the most knowledgeable.[49] Further, the categorical exclusion of witnesses on credibility grounds became thought of as "inept and primitive," as faith in the jury's lie-detecting abilities increased.[50] Nearly all states have followed suit and adopted some version of FRE 601.[51]

May's unreliability rationale for a third-party guilt exclusion was thus eroded by the development of general witness competence statutes removing the bar against criminal defendants from testifying. Ironically, however, the removal of this barrier may have prompted the spread of the direct connection doctrines as a reaction against this pro-jury trend—a way to channel and focus mistrust of defendants' "self-serving" evidence in lieu of barring their testimony outright. In

45. *See, e.g.*, *United States v. Dow*, 25 F. Cas. 901, 902 (C.C.D. Md. 1840) ("negroes and mulattoes, free or slave," were not competent witnesses for any cases involving "Christian white person[s]"); *United States v. Lee*, 26 F. Cas. 908, 908–09 (C.C.D.D.C. 1834) (non-believer in God or afterlife incompetent to testify).

46. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987); *see Benson v. United States*, 146 U.S. 325, 336 (1892) ("[T]he theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, *unaffected as a party by the result, and free from any of the temptations of interest*." (emphasis added)).

47. 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6002, at 22 (2d ed. 2007); *see Ferguson v. Georgia*, 365 U.S. 570, 577 n.6 (1961) (showing widespread adoption of general competency statutes between 1866 and 1900).

48. *See Mizrahi v. Allstate Ins. Co.*, 647 A.2d 486, 488 (N.J. Super. Ct. Law Div. 1994) ("[W]itness disqualification tends to lead toward the suppression of the truth.").

49. WRIGHT & GOLD, *supra* note 47, § 6002, at 22.

50. *Id.* at 23.

51. 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § T-89-94 (Mark S. Brodin ed., 2d ed. 1997) (listing forty-one states enacting some version of FRE 601).

any event, the direct connection doctrine became widespread within a few decades of the passing of witness competency restrictions.[52]

In modern direct connection cases, other rationales have emerged. The most commonly asserted policy is that the direct connection doctrines maintain orderly and efficient trials through the limiting of collateral issues.[53] An oft-quoted, early rendition of this policy comes from an old California case, *People v. Mendez*[54]:

> It rests upon the necessity that trials of cases must be both *orderly and expeditious*, that they must come to an end, and that it should be a logical end. To this end *it is necessary that the scope of inquiry into collateral and unimportant issues must be strictly limited.* It is quite apparent that if evidence of motive alone upon the part of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendants to produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased; that *a great many trial days might be consumed* in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.[55]

A second concern of judges is the potential "fabrication risk" of third-party guilt evidence.[56] Direct connection advocates argue that the removal of the doctrines "would open the door for the defense to cast doubt on the defendant's guilt by questionable means . . . . [T]he defendant [could] offer fabricated exculpatory evidence."[57] An early direct connection case made these doomsday predictions, stating that admitting third-party guilt evidence would "effect a dangerous innovation upon the law of evidence in criminal cases, and open the door to the most fraudulent contrivances to procure the acquittal of

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52. McCord, *supra* note 4, at 924–26 ("The direct connection doctrine made slow but steady progress during the first half of the twentieth century.").

53. *See, e.g.*, *State v. Denny*, 357 N.W.2d 12, 17 (Wis. Ct. App. 1984) (stating direct connection rule prevents trials from "degenerating the proceedings into a trial of collateral issues").

54. 223 P. 65 (Cal. 1924).

55. *Id.* at 70–71 (emphasis added); *see also People v. Green*, 609 P.2d 468, 480 (Cal. 1980) ("The rule is designed to place reasonable limits on the trial of collateral issues."), *abrogated by People v. Martinez*, 973 P.2d 512 (Cal. 1999).

56. *See* Blume et al., *supra* note 7, at 1084.

57. Brett C. Powell, *Perry Mason Meets the "Legitimate Tendency" Standard of Admissibility (and Doesn't Like What He Sees)*, 55 U. MIAMI L. REV. 1023, 1026 (2001).

parties accused of crime."[58] Professor McCord argues that this policy rationale "has animated [the] doctrine for over a hundred and fifty years."[59]

A third rationale is that the direct connection doctrines "avoid undue prejudice to the People from unsupported jury speculation as to the guilt of other suspects."[60] According to Professor McCord, the direct connection doctrines are justifiable to prevent "speculative acquittals."[61] A fourth rationale found in a small handful of cases is that direct connection doctrines protect the rights of third parties from reputational harm due to accusations or suggestions of guilt.[62] We will attempt to show the inadequacy of these rationales in Parts II through IV.

2. THE FULL-BORE DIRECT CONNECTION DOCTRINE

Today, by our count, thirty-one states and two federal circuits use some version of the classically formulated, or "full-bore," version of the direct connection doctrine.[63] Previous studies of this doctrine have tended to undercount by looking for jurisdictions that actually call their doctrine "direct connection."[64] But whether using the phrase "direct connection" or something else, all of these jurisdictions exclude relevant third-party guilt evidence based on a sufficiency test.

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58. *Munshower v. State*, 55 Md. 11, 23 (1880).

59. McCord, *supra* note 4, at 925.

60. *State v. Rabellizsa*, 903 P.2d 43, 46 (Haw. 1995) (quoting *People v. Green*, 609 P.2d 468 (Cal. 1980)).

61. *See* McCord, *supra* note 4, at 976–77.

62. *See, e.g.*, *State v. Atkinson*, 774 N.W.2d 584, 590 (Minn. 2009) ("The requirement that a proper foundation be laid is intended to 'avoid the use of bare suspicion and safeguard the third person from indiscriminate use of past differences with the deceased.'"(quoting *Minnesota v. Hawkins*, 260 N.W.2d 150, 159 (Minn. 1977))); Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 FORDHAM L. REV. 1643, 1680 n.212 (2000).

63. *See infra* Appendix. The state-by-state count is something of a moving target, both because scholars have varied slightly in what they count as a "direct connection doctrine," and because several states have changed their doctrine over time. *Compare* McCord, *supra* note 4, at 936 n.99 (counting 26 direct connection states in 1996), *with* Blume et al., *supra* note 7, at 1080 n.77 (counting 17 direct connection states). McCord and Blume appear to have counted only those states that actually use the term "direct connection" in their test. The two federal circuits are the First and Second. *See United States v. White*, 692 F.3d 235, 245–46 (2d Cir. 2012) (excluding third-party guilt evidence, which does not "sufficiently connect the other person to the crime"); *United States v. Patrick*, 248 F.3d 11, 21–22 (1st Cir. 2001) (third-party guilt evidence is relevant, but requires "a connection" between the third party and the crime, "not mere speculation").

64. *See* Blume et al., *supra* note 7, at 1080; McCord, *supra* note 4, at 936.

One of the most basic tenets of modern evidence law is that relevance is not sufficiency. Relevant evidence need not prove anything, but merely change the probability of a fact of consequence. When one speaks of evidence proving a point, or combining together with other relevant evidence to justify a conclusion or belief, one is speaking of a sufficiency test: evidence sufficient to support a finding of some kind. A familiar homily expresses this idea: "a brick is not a wall." Relevance is the brick, sufficiency is the wall. The direct connection doctrine, in all its variants, holds in some fashion that third-party guilt evidence is inadmissible unless the defendant has built a wall. The height of that wall, and the name given to it, may vary from state to state, but thirty-one states exclude individual bricks: no third-party guilt evidence will be admitted unless it proves something to a stated threshold. As the Supreme Court of Florida states its version of the doctrine, "Before evidence of the guilt of another may be deemed relevant and thereby admissible, the evidence must clearly link that other person to the commission of the crime."[65] The Florida court is plainly wrong about relevance, which doesn't require either "direct" or "clear" links, but that court has merely used the label *relevance* to talk about a sufficiency test. Other jurisdictions look for a "direct," "proximate," or "sufficient" connection (or "link") between the third person and the crime to establish admissibility.[66]

The rigor of the direct connection sufficiency test varies somewhat. On the stricter end of the spectrum, Wisconsin requires that "[a] defendant . . . show the third party's motive, opportunity *and* 'some evidence to directly connect the third person to the crime charged which is not remote in time, place or circumstance[].'"[67] Alabama has a stringent three-part test, requiring "(1) that the evidence relates to the res gestae of the crime; (2) that the evidence excludes the accused as a perpetrator of the offense; and (3) that the evidence would have been admissible if the third party had been on trial."[68] In this way, Alabama requires that third-party guilt evidence actually prove the

65. *King v. State*, 89 So. 3d 209, 224 (Fla. 2012) (quoting *Johnson v. United States*, 552 A.2d 513, 516 (D.C. 1989)).

66. *See, e.g.*, *State v. Wright*, 89 A.3d 458, 464 (Conn. App. Ct. 2014) ("The defendant must . . . present evidence that directly connects a third party to the crime."); *Ford v. State*, 444 S.W.3d 171, 200 (Tex. App. 2014) ("When a defendant seeks to introduce evidence of an 'alternate perpetrator,' he must establish a *sufficient nexus* between that person and the crime." (emphasis added) (citations omitted) (quoting *Lopez v. State*, 314 S.W.3d 54, 61 (Tex. Ct. App. 2010))), *petition for cert. filed*, *Ford v. Texas*, No. 15-8574 (U.S. Mar. 16, 2016).

67. *State v. Rosenthal*, No. 2013AP1847-CR, 2014 WL 2722772, at *4–5 (Wis. Ct. App. June 17, 2014) (emphasis added) (quoting *State v. Denny*, 357 N.W.2d 12, 17 (Wis. Ct. App. 1984)).

68. *Snyder v. State*, 893 So. 2d 488, 537 (Ala. Crim. App. 2003).

defendant's innocence *and* that evidence is only admissible if the defendant can get past the evidentiary rules meant to protect the defendant, which Alabama uses to shield the third party. While it is not clear that the stricter "direct connection" states necessarily require "direct evidence" of third-party guilt, some jurisdictions make a show of stating that circumstantial, rather than direct, evidence of third-party guilt is admissible only so long as it "links" the third party to the crime or "establishes a reasonable connection."[69]

Even tests that appear less stringent still require something more than a showing of relevance. The Iowa courts hold that "evidence offered by a defendant tending to incriminate another must be confined to substantive facts"—what are those?—"and create more than a mere suspicion that such other person committed the offense."[70] Several courts inject some ambiguity into the strictness of their test by referring to the *tendency* of the third-party guilt evidence to make a direct connection. Thus, Virginia maintains that "[p]roffered evidence 'that merely suggests a third party may have committed the crime charged is inadmissible; only when the proffered evidence *tends* clearly to point to some other person as the guilty party will such proof be admitted.'"[71] Garden-variety relevance is a tendency toward proving a fact rather than proof of that fact; therefore, it might be argued that the use of "tend to" or "tendency" suggests that the court is simply specifying what makes the evidence relevant. Yet on closer analysis, it is clear that this is not the case. Relevant evidence need only have a slight tendency to make the case for guilt less probable than without the evidence. The fact of a special test for relevance for this type of evidence suggests a higher threshold. Moreover, the "tendency" language is invariably accompanied by other language indicating a sufficiency threshold. The

69. *People v. Hall*, 718 P.2d 99, 104 (Cal. 1986) ("[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime."); *State v. Mitchell*, 4 A.3d 478, 485–86 (Me. 2010) ("[O]ther, *indirect types of admissible evidence* may also establish a reasonable connection between the alternative suspect and the crime." (emphasis added)).

70. *State v. Campbell*, 714 N.W.2d 622, 630 (Iowa 2006).

71. *Johnson v. Commonwealth*, 529 S.E.2d 769, 784 (Va. 2000) (emphasis added) (quoting *Soering v. Deeds*, 499 S.E.2d 514, 518 (1998)); *see also State v. Covington*, 69 A.3d 855, 865 (R.I. 2013) ("The offer of proof must contain '[(1)] evidence of another person's motive to commit the crime with which a defendant is charged in conjunction with other evidence *tending* to show [(2)] the third person's opportunity to commit the crime and [(3)] a proximate connection between that person and the actual commission of the crime.'" (emphasis added) (quoting *Rivera v. State*, 58 A.3d 171, 181 n.7 (R.I. 2013))); *State v. Parr*, 534 S.E.2d 23, 29 (W. Va. 2000) ("In a criminal case, the admissibility of testimony implicating another person as having committed a crime hinges on a determination of whether the testimony *tends to directly link* such person to the crime, or whether it is instead purely speculative." (emphasis added)).

Virginia language states that the tendency must be "clear" and must do more than "merely suggest." Ordinary relevance contains no ban on "mere suggestion" (whatever that means).[72]

3. THE FRE 403 APPROACH

If third-party guilt evidence were treated the same as other evidence and not singled out for disfavored treatment, we would find courts analyzing its admissibility under FRE 401 and 403 or their state law equivalents.[73] Under this approach, a defendant's third-party guilt evidence should be weighed by the "any tendency" standard of relevance under FRE 401 and the judicial balancing of probative value against the FRE 403 dangers.[74]

Fourteen states and eight federal circuits purport to follow this approach.[75] Indeed, several of those states have adopted the FRE 403 approach based on an express abandonment of a direct connection doctrine.[76] But a problem remains: many of these jurisdictions continue to subject third-party guilt evidence to disfavored treatment under the guise of FRE 403 and its state law analogues. Rather than applying FRE 403–type rules in the way they are designed—as highly contextual, case-by-case decisions balancing probative value against fairness and efficiency concerns—these courts tend to systematically exclude

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72. We discuss this point further *infra* Part III.B.

73. FRE 401 provides: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." FED. R. EVID. 401. For a rare and exemplary illustration of a court treating third-party guilt evidence as ordinary evidence subject to the general relevance inquiry, see *United States v. Stever*, 603 F.3d 747 (9th Cir. 2010).

74. Pursuant to FRE 403, a judge can exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice or any of the other 403 dangers: confusing the issues, misleading the jury, undue delay, wasting time, "or needlessly presenting cumulative evidence." FED. R. EVID. 403.

75. *See infra* Appendix. Of the eight federal circuits that follow the FRE 403 approach, four intertwine "connection" terminology and FRE 403 language. *See, e.g.*, *United States v. Lucas*, 499 F.3d 769, 782 (8th Cir. 2007) (holding alternate perpetrator evidence must establish "a non-speculative nexus" and satisfy FRE 403 balancing); *United States v. Jordan*, 485 F.3d 1214, 1219 (10th Cir. 2007) (blending "connection" language and FRE 403 concerns).

76. *See, e.g.*, *State v. Meister*, 220 P.3d 1055, 1059 (Idaho 2009) (abandoning Idaho's direct connection doctrine because the rule was "implicitly overruled" when the Idaho Rules of Evidence were enacted in 1985); *People v. Primo*, 753 N.E.2d 164, 168 (N.Y. 2001) ("'Clear link' and similar coinages, however, may be easily misread as suggesting that evidence of third-party culpability occupies a special or exotic category of proof. The better approach, we hold, is to review the admissibility of third-party culpability evidence under the general balancing analysis that governs the admissibility of all evidence.").

third-party guilt evidence by applying the 403 balance categorically. The net effect in many jurisdictions is to retain a version of a direct connection doctrine under another name.

In a later section, we will examine the flaws in applying FRE 403 balancing rules to third-party guilt evidence. In this section, our focus is to show the extent to which disfavored treatment of third-party guilt evidence systematically persists in FRE 403 jurisdictions.

As argued further below, the FRE 403 balance requires an analysis of the probative value of a *particular* item of offered evidence against a set of 403 "dangers" (unfair prejudice, confusion of issues, misleading the jury, or waste of time) created by that specific evidence in the context of that specific case. Probative value includes both the strength of the evidence's tendency toward proving a contested point and the offering party's need for the evidence. To apply a 403 balance by categorical generalization—e.g., gory photographs "are always unfairly prejudicial" or "are always viewed with suspicion"—improperly fails to undertake the required case-specific analysis. In the present context, a generic or systematic application of 403 to third-party guilt evidence simply replicates the direct evidence approach.[77]

On the surface, it is fairly easy for a court to make a 403 balance look case-specific and particularized, but there are telltale signs that the court is approaching the question categorically. Simply identifying third-party guilt evidence as a special category at all raises a red flag. But beyond that, there are more specific indicators that a court is replicating a direct connection analysis. The direct connection doctrine looks at the sufficiency of the evidence to prove the third party's guilt without considering the defendant's need for the evidence, whereas FRE 403 probative value is supposed to consider need. Thus, a supposed 403 court's failure to consider need is a signal of replicating a direct connection doctrine. More importantly, the direct connection doctrine is typically justified as a kind of categorical policy-based exclusion.[78] Those policies may overlap considerably with the 403 dangers—confusing or misleading the jury, wasting court time—but a true 403 balance requires an individualized assessment of those dangers. Relying on generic dangers of the category—as in "third-party guilt evidence tends to confuse the issue" or "can require lots of trial time exploring tangential issues"—reflects the application of a categorical direct connection rule rather than an individualized 403 balance.

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77. *Cf.* Blume et al., *supra* note 7, at 1083–84 (arguing that the FRE 403 approach becomes a de facto "reverse 403," because it often leads to the same high level of exclusion of third-party guilt evidence as the direct connection doctrine).

78. *See infra* Part II.

Sure enough, these telltale signs of a direct connection doctrine in the guise of a 403 analysis are present in numerous cases. In *Luna v. Commonwealth*,[79] for example, the court excluded a homicide defendant's evidence that a third party—the victim's former boyfriend—had physically abused the victim and once verbally threatened to kill her.[80] Purporting to exclude the evidence under a state law analogue to FRE 403, the court observed that "[t]he possibility of [third-party guilt evidence] confusing or misleading the jury is very real and must be closely monitored by the trial court."[81] This sweeping claim is obviously not one that courts make about all evidence; rather the court finds third-party guilt evidence particularly and categorically suspicious. In *People v. Primo*,[82] the New York Court of Appeals attempted to harmonize a New York line of direct connection ("clear link") cases with its now-preferred 403-balancing approach by observing that the "clear link" cases would probably all have come out the same way under a 403-type balancing test.[83] Such a claim raises the suspicion—indeed, virtually admits—that 403 is being applied as an equivalent substitute for explicit direct connection doctrines.

Many courts recast probative value in the same kinds of language used in full-bore direct connection tests. For example, the Colorado courts have upheld 403-type exclusions of third-party guilt evidence that fails to "establish[] a non-speculative connection or nexus between the alternate suspect and the crime charged."[84] By itself, such a generalized statement that evidence of this quality has low probative value should not be problematic. However, it becomes problematic if

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79. 460 S.W.3d 851 (Ky. 2015).

80. *Id.* at 881.

81. *Id.* at 880–81; *see also United States v. Lighty*, 616 F.3d 321, 358–59 (4th Cir. 2010) (explaining that third-party guilt evidence categorically raises 403 dangers of "prejudicial, misleading, and confusing evidence").

82. 753 N.E.2d 164 (N.Y. 2001).

83. *Id.* at 167–69.

84. *People v. Elmarr*, 351 P.3d 431, 438 (Colo. 2015); *see, e.g.*, *United States v. Thibeaux*, 784 F.3d 1221, 1225–26 (8th Cir. 2015) (Third-party guilt evidence is excludible under FRE 403 "where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue." (quoting *Homes v. South Carolina*, 547 U.S. 319, 327 (2006))); *United States v. Lighty*, 616 F.3d 321, 358 (4th Cir. 2010) ("When determining whether evidence of an alternative perpetrator should be admitted at trial . . . [the] evidence 'is relevant, but there must be evidence' of a '*connection* between the other perpetrators and the crime, not mere speculation on the part of the defendant.' Alternative perpetrator cases thus balance two evidentiary values: the admission of relevant evidence probative of defendant's guilt or innocence under Rule 401 *with the exclusion of prejudicial, misleading, and confusing evidence under Rule 403*." (emphasis added) (quoting *DiBenedetto v. Hall*, 272 F.3d 1, 8 (1st Cir. 2001)) (citations omitted)).

the courts do not undertake the other individualized aspects of the 403 balance. And they frequently don't.

Typically, FRE 403 courts limit their analysis to examining the limited probative value of the third-party guilt evidence. Rarely do they make a particularized inquiry into the 403 dangers, instead stating those in generic terms. The *Primo* court, for example, stated that "the countervailing risks of delay, prejudice and confusion are particularly acute" with third-party guilt evidence.[85] The *Luna* court held that its state 403 rule "consistently" requires "at the very least, opportunity *and* motive should be shown before evidence of an altperp theory comes before the jury," because such evidence is difficult for the jury to "digest."[86] Several federal circuits repeat the talismanic quotation that "speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice," without the court undertaking any case-specific analysis.[87] Other courts rely on conclusory statements of the presence of a 403 danger or generic references to 403-type dangers that can be raised by third-party guilt evidence in other, or hypothetical, cases.[88] One state supreme court has said that the probative value of third-party guilt evidence was outweighed by "the State's [strong] interest in preserving orderly trials"—without examining how the offered evidence would have created disorder in the trial at hand.[89] Finally, courts virtually never engage in an individualized examination of the defendant's need for the third-party guilt evidence, which would require looking at the comparative strength of the defendant's case with and without the evidence.[90]

C. The Critical Shortfall in Third-Party Guilt Scholarship

Most scholars addressing the direct connection doctrines have been critical of the disfavored treatment given third-party guilt evidence. This scholarship has done a good job of identifying the problem of disfavored treatment and has offered cogent arguments about the

85. *Primo*, 753 N.E.2d at 167–69.

86. *Luna*, 460 S.W.3d at 880–81.

87. *United States v. Settle*, 267 F. App'x 395, 398 (5th Cir. 2008); *accord United States v. Jordan*, 485 F.3d 1214, 1219 (10th Cir. 2007).

88. *State v. Bigger*, 254 P.3d 1142, 1154–56 (Ariz. Ct. App. 2011) (conclusory reference to confusion of issues); *State v. Mosby*, 595 So. 2d 1135, 1140 (La. 1992) (conclusory reference to all of the 403 dangers).

89. *State v. Garza*, 563 N.W.2d 406, 410–12 (S.D. 1997) (quoting *State v. Braddock*, 452 N.W.2d 785, 789 (S.D. 1990)).

90. In none of the 403-type balancing cases cited in the footnotes to this article or the appendix did the court undertake a "need" analysis.

procedural unfairness to defendants.[91] Scholars have also criticized the doctrine for encouraging sloppy police work,[92] creating a pro-prosecution double-standard in evidentiary rulings,[93] and throwing the defendant into the jury trial "story-battle" without weapon or armor.[94] Direct connection critics have argued that these procedural inequities violate the Constitution, specifically the right to present a defense, the right to a jury trial, and the Equal Protection clause.[95]

While the scholarship has revealed some aspects of the procedural unfairness of the full-bore direct connection doctrine, few commentators have examined the danger of treating third-party guilt evidence as special or distinct. Several studies of the direct connection doctrine advocate that courts should treat third-party guilt evidence like they would any other evidence.[96] Frequently, these scholars advocate

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91. *See* Findley & Scott, *supra* note 5, at 342–43 ("Evidentiary rules in most jurisdictions impose significant limitations on the ability of defendants to introduce evidence of alternate or third-party suspects."); James S. Liebman et al., *The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence*, 98 IOWA L. REV. 577, 668 (2013) ("[M]ost jurisdictions strictly limit the admissibility of concededly relevant evidence that implicates . . . a specified alternative suspect."); Suni, *supra* note 62, at 1676 ("[T]he direct connection doctrine provides a preliminary evidentiary hurdle for [the] defendant.").

92. *See* Findley & Scott, *supra* note 5, at 345; Suni, *supra* note 62, at 1690.

93. *See* Michael D. Cicchini, *An Alternative to the Wrong-Person Defense*, 24 GEO. MASON U. CIV. RTS. L.J. 1, 2 (2013) ("[W]hen a defendant attempts to prove that a specific third party committed the crime, a trial court will employ . . . several evidentiary double standards, to exclude a defendant's evidence before trial even begins.").

94. Blume et al., *supra* note 7, at 1089.

95. Cicchini, *supra* note 93, at 5–7 (contending that the direct connection rule violates the right to present a complete defense because the government has no competing legitimate interest in excluding third-party guilt evidence); Powell, *supra* note 57, at 1026 (arguing that differing interpretations of what constitutes admissible third-party guilt evidence from state to state violates equal protection); Suni, *supra* note 62, at 1684–86 (arguing that the direct connection doctrines are arbitrary when 403 balancing can adequately accommodate the legitimate interests of the state while not risking improper exclusion of defense evidence). *See also* Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621 (1998) (arguing generally that exclusion of defense evidence on grounds of "unreliability" violates the right to jury trial).

96. *See* Powell, *supra* note 57, at 1027; Suni, *supra* note 62, at 1692–93 ("If the evidence passes this test of relevance, the court should then engage in a careful balancing of probative value and prejudicial effect."); Bourgon B. Reynolds, Note, *Constitutional Law—It Wasn't Me!* Zinger v. State *and Arkansas's Unconstitutional Approach to Third-Party Exculpatory Evidence*. Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993).*, 34 U. ARK. LITTLE ROCK L. REV. 191, 217 (2011) ("The judge will begin with a Rule 401 relevancy determination. . . . Next, the judge will evaluate the exculpatory evidence under a strict application of Rule 403."). *But see* Robert Hayes, *Enough Is Enough: The Law Court's Decision to Functionally Raise the*

replacing full-bore direct connection doctrines with 403 balancing. But these studies typically overlook the tellingly high rate of exclusion of third-party guilt evidence under 403 balancing.[97] They also overlook courts' tendencies to combine purported 403 balancing with direct connection sufficiency tests, as well as courts' misuse of 403 balancing to categorically disfavor third-party guilt evidence. On the contrary, much scholarship seems, either intentionally or unconsciously, to go along with the idea that third-party guilt evidence is a special category raising special problems.[98] This can be seen in some of the solutions to the direct connection problem offered up by scholars. Alternative sufficiency tests offered by some critics, such as probable cause,[99] or "threshold showing[s] of innocence,"[100] still treat third-party guilt evidence as a suspicious category. The proposed solutions thereby perpetuate the problem of excessive exclusion of third-party guilt evidence.

II. THE DIRECT CONNECTION DOCTRINES AS AN FRE 403–TYPE RULE

In this section, we examine the FRE 403–type concerns that lead courts to exclude third-party guilt evidence. All U.S. jurisdictions have a rule equivalent to FRE 403, which provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.[101]

"Reasonable Connection" Relevancy Standard in State v. Mitchell, 63 ME. L. REV. 531, 533 (2011) (noting FRE 402's liberality in the admission of evidence); Joan L. Larsen, Comment, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651, 681 (1993) (same).

97. There is an exception here. *See* Blume et al., *supra* note 7, at 1083 (observing high rate of 403 exclusion).

98. *See, e.g.*, McCord, *supra* note 4, at 919; Suni, *supra* note 62, at 1684, 1687 (describing FRE 403 dangers for third-party guilt evidence as "legitimate" and "not unfounded"). Professors Blume *et al.* seem ambivalent on this point. *Compare* Blume et al., *supra* note 7, at 1083 (acknowledging high rate of exclusion of third-party guilt evidence under the FRE 403 approach), *with id.* at 1105 (Defendants "should not be allowed to waste the courts' time with speculation.").

99. *See* Blume et al., *supra* note 7, at 1104.

100. Lissa Griffin, *Avoiding Wrongful Convictions: Re-Examining the "Wrong-Person" Defense*, 39 SETON HALL L. REV. 129, 132 (2009).

101. FED. R. EVID. 403; *see, e.g.*, CAL. EVID. CODE § 352 (2015) ("The court in its discretion may exclude evidence if its probative value is substantially outweighed

Many jurisdictions use their 403 equivalent as a systematic basis for disfavoring third-party guilt evidence. Further, some courts and commentators seeking to justify their explicitly named direct connection doctrines argue that they have simply routinized a 403 balance.

In this section, we argue that both of these approaches—relying on FRE 403–type balancing rules directly or indirectly as rationales for a formalized direct connection doctrine—represent an abuse of the 403-type rule. First, FRE 403-type rules are not intended to be applied categorically at all. FRE 403 is designed to exclude specific items of evidence in the particular facts and circumstances of a particular case and not to apply in an iterative way across the board to an identified category of evidence. Second, FRE 403–type rules are not properly applied to address "fabrication risk." Third, the actual provisions of FRE 403 and its state-law analogues do not warrant categorical application to third-party guilt evidence in particular. There is nothing about such evidence as a category that raises substantial FRE 403 dangers (unfairness, confusion, misleading, and delay) relative to its probative value. If anything, third-party guilt evidence carries less risk of such dangers outweighing probative value than other evidence.

A. Categorical Application as a Misuse of FRE 403

Courts misuse FRE 403–type rules in any situation in which they purport to apply them systematically to an identified category of evidence. To see this argument requires briefly returning to first principles of modern evidence law. Since the turn of the twentieth century, the trend in evidence law has been one of eliminating categorical common law restrictions on the admission of relevant evidence.[102] Courts and commentators recognized that accuracy in fact-finding in a jury system would be promoted by allowing the factfinder to consider as much relevant evidence as would be consistent with the fair and efficient administration of trials. Relevance itself was a matter of common sense, not a doctrinal formula accessible only to

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by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.").

102. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5005 (2d ed. 2005) ("Thayer laid the foundation for the structure of modern codifications by establishing the admissibility of all relevant evidence as the fundamental principle; unlike his predecessors who had seen evidence law as prescribing what was admissible, for Thayer the law of evidence consisted almost entirely of exceptions to the fundamental principle—that is, rules of exclusion.").

legally trained professionals.[103] As James Bradley Thayer famously put it, "The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience . . . ."[104] Thus, his protégé John Henry Wigmore later elaborated, "[A]ll evidence with any probative value, however slight, [must] be admitted unless some specific exclusionary rule provides otherwise."[105] Throughout the twentieth century the source of those "specific exclusionary rules" shifted from common law courts to statutes and evidence codes, and the admission of relevant evidence was generally liberalized. The historical watershed was the adoption of the California Evidence Code in 1965. The California code heavily influenced the drafters of the Federal Rules of Evidence, drafted between 1969 and 1972 and taking effect in 1975.[106] Since then, most states have adopted or revised their evidence codes to incorporate the concepts of the California and Federal rules.[107]

Two fundamental principles relevant here underlie these codes. The first of these principles is stated in the basic relevance rule. As the California Evidence Code crisply asserts, "Except as otherwise provided *by statute*, all relevant evidence is admissible."[108] FRE 402 similarly provides, "Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court."[109] The language in both of these highly influential evidence codes makes clear that categorical exclusions of relevant evidence are no longer to come from judge-made evidence law but rather from statutory or

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103. *Ferguson v. Georgia*, 365 U.S. 570, 594 n.18 (1961) ("[A]s jurors have become more capable of exercising their functions intelligently, the Judges both in England and in this country, are struggling constantly to open the door wide as possible . . . to let in all facts calculated to affect the minds of the jury in arriving at a correct conclusion. . . . Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury, however remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict." (quoting *Johnson v. State*, 14 Ga. 55, 61–62 (1853))); 27 WRIGHT & GOLD, *supra* note 47, § 6092.

104. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (1898).

105. 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 14.1, at 714 (Peter Tillers rev. ed., Little, Brown and Co. 1983).

106. *See* WRIGHT & GRAHAM, *supra* note 102, § 5006 (California Evidence Code heavily influenced FRE drafters); Andrea N. Kochert, *The Admission of Hearsay Through Rule 106: And Now You Know the Rest of the Story*, 46 IND. L. REV. 499, 514 (2013) (same).

107. 6 WEINSTEIN & BERGER, *supra* note 51, § T-1 ("Forty-four states, Guam, Puerto Rico, the Virgin Islands, and the military have adopted rules of evidence patterned on the Federal Rules of Evidence.").

108. CAL. EVID. CODE § 351 (2015) (emphasis added).

109. FED. R. EVID. 402 (bullet formatting omitted).

constitutional sources. The California code is explicit. The FRE equally so, since the "rules prescribed by the Supreme Court" refer to court rules promulgated pursuant to the Rules Enabling Act or to constitutionally based exclusionary rules. The Advisory Committee to the FRE clarified this point: "The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations."[110] Judge-made rules are conspicuously absent from this list. Thus, according to the Supreme Court, "In principle, under the Federal Rules no common law of evidence remains."[111] As Professor Edward J. Imwinkelreid summed up, "rule 402 deprives the judiciary of the common law power to prescribe exclusionary rules of evidence."[112]

The state and federal evidence codes drew a curtain on the prior era of judge-made exclusionary rules, many of which were abolished. Categorical common law restrictions on habit evidence, "ultimate issue" opinion testimony, lay opinions, and legal opinions were eliminated.[113] To be sure, several exclusionary rules and exceptions to those rules—particularly hearsay and character evidence—were retained in the codes. What was not retained, however, was continued judicial development of new exclusions and exceptions. As with any statute or code, courts retain a certain degree of interpretive latitude that may, on occasion, approach a gray area between legislative and judicial lawmaking on evidence rules. But the codes are clear in their intent: courts are to leave the creation of exclusionary policies (and exceptions) to legislatures.

This principle is also seen in the abolition of so-called competency restrictions on witnesses. As discussed above, the common thread in these competency exclusions was a belief that these categories of persons were unlikely to tell the truth on the witness stand.[114] Non-whites, convicts, and atheists were believed to lack the moral character for truth-telling, whereas parties and their spouses were

110. FED. R. EVID. 402 advisory committee's note.

111. *United States v. Abel*, 469 U.S. 45, 51 (1984) (quoting Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1987)); *see Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 584, 587 (1993) (enactment of FRE supersedes judge-made *Frye* rule restricting admissibility of expert testimony); *Bourjaily v. United States*, 483 U.S. 171, 177–78 (1987) (enactment of FRE supersedes judge-made "anti-bootstrapping" rule restricting admissibility of co-conspirator hearsay).

112. Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used To Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 882 (1988).

113. *See* FED. R. EVID. 406, 701, 704.

114. *See supra* text accompanying notes 45–51.

deemed hopelessly biased.[115] These categorical exclusions were swept aside the in the modern evidence codes. FRE 601 is typical in its statement that "[e]very person is competent to be a witness unless these rules provide otherwise," and the FRE go on to provide only that the judge and jurors cannot testify in the trial at hand.[116]

Abolition of the common law witness competency exclusions points to the second fundamental principle of modern evidence codes. Judgments of witness credibility are for the jury, not the court. Witness competency exclusions assumed that juries were not capable of ferreting out fabricated testimony by dishonest or biased witnesses. Hence, competency restrictions would "protect" juries from lying sorts. Modern evidence rules replace these debatable and often deplorable generalizations about who lies with individualized jury findings of credibility. The rules impose certain limitations on admission of evidence impeaching witnesses' credibility, but determining credibility is ultimately a jury question.[117]

The primacy of the jury in witness credibility determinations is embodied in various rules of both evidence and procedure. Questions of relevance are to be decided based on whether a reasonable jury could find that the evidence has "any tendency to make a [consequential] fact more or less probable."[118] It is not for the judge to decide whether she personally finds this tendency but whether a reasonable jury could.[119] Moreover, in making this determination, the judge must assume that the witness has testified truthfully, leaving the question of credibility to the jury.[120] Likewise, foundation questions, which are fundamentally questions of whether the offering party has shown the offered evidence

115. *See* FED. R. EVID. 601 advisory committee's note; 1 WEINSTEIN & BERGER, *supra* note 51, § 601; RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS AND CASES 176–77 (5th ed. 2011).

116. FED. R. EVID. 601; *see* FED. R. EVID. 605, 606.

117. For the most part. The lingering suspicion that persons convicted of crimes have a character for lying continues in the impeachment rules, though it does not bar their testimony. *See* FED. R. EVID. 608, 609.

118. FED. R. EVID. 401.

119. *See, e.g.*, *United States v. Williams*, 545 F.2d 47, 50 (8th Cir. 1976); 6 WEINSTEIN & BERGER, *supra* note 51, § 1008.03.

120. *See, e.g.*, *United States v. Scheffer*, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system 'is [that] the jury is the lie detector.'" (quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973))); *United States v. Evans*, 728 F.3d 953, 962 (9th Cir. 2013). There is a narrow exception for testimony that is so "inherently incredible" that no reasonable jury could believe it. *See, e.g.*, *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013); 3 WEINSTEIN & BERGER, *supra* note 51, § 602.03.

to be relevant, leave credibility questions to the jury.[121] Personal knowledge under FRE 602 can be established by the witness's own assertion of firsthand perception, which must be assumed true by the judge for admissibility purposes.[122] Foundation questions under FRE 104(b) and 901, like questions under FRE 602, are all decided based on "evidence sufficient to support a finding" by the jury in a summary judgment type analysis.[123] That is, questions of witness credibility and the weight of the evidence are for the jury.[124] Here is the tie-in to procedural codes. Judgment as a matter of law (JMOL), whether in a civil or criminal case, cannot be decided based on judicial weighing of the evidence or assessing the credibility of witnesses.[125] Judges can grant JMOL only if, taking the opposing party's evidence as true, it is nevertheless insufficient to meet the burden of proof. Even FRE 403 reserves credibility questions for the jury. The judge is entitled to weigh the evidence insofar as she must balance its "probative value" against the 403 dangers of unfairness, confusion, misleading, and delay. But the judge must nevertheless assume that the witness is testifying truthfully in undertaking the FRE 403 balance.[126]

The foregoing discussion should put FRE 403 in its proper context. FRE 403 is the one exclusionary rule in modern evidence

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121. *See* FED. R. EVID. 104(b) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."). Under FRE 104(b),

> the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact by a preponderance of the evidence.

Huddleston v. United States, 485 U.S. 681, 690 (1988).

122. ALLEN ET AL., *supra* note 115, at 180; *see* FED. R. EVID. 602 (firsthand knowledge established by "evidence . . . sufficient to support a finding"); *Huddleston*, 485 U.S. at 690 ("evidence sufficient to support a finding" standard precludes trial judge from assessing credibility).

123. FED. R. EVID. 104(b), 901.

124. *See Huddleston*, 485 U.S. at 690; *see also* WRIGHT & GRAHAM, *supra* note 102, § 5054 ("By tradition, the credibility inferences belong to the jury and are to be secured by the oath and cross-examination rather than by rules of relevance enforced by the judge.").

125. *See, e.g.*, *Reeves v. Sanderson Plumbing Prod. Corp.*, 530 U.S. 133, 150 (2000) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986))).

126. *See, e.g.*, *Shepherd v. Dallas Cnty.*, 591 F.3d 445, 457 (5th Cir. 2009) ("Rule 403 does not permit exclusion of evidence because the judge does not find it credible."); 22A WRIGHT & GRAHAM, *supra* note 102, § 5222; Imwinkelried, *supra* note 112, at 886–88 (demonstrating that allowing judges to determine credibility under FRE 403 would undermine FRE 402, and the foundation rules of 104(b), 602 and 901).

codes that is stated as a purely non-categorical rule of discretion. It is not restricted by subject matter as are, say, the rules limiting evidence of subsequent remedial measures or character for sexual misconduct in cases alleging sexual misconduct.[127] It is not restricted by the form of evidence, such as the hearsay rule, the past specific acts prohibition, or the expert witness rules.[128] The policy guidance it provides in structuring the balancing test is entirely case-specific. The strength of and need for the evidence is determined in the context of the offering party's case, and the impact of the evidence on rational jury decisionmaking and the fairness and efficiency of the trial must likewise be determined in its case-specific context.

These seemingly open-ended discretionary factors themselves reflect a significant limitation on FRE 403–type rules. They are not to be applied categorically. That is to say, they are not to be used as an end-run around the fundamental principle of the modern codes, that *courts are not to re-create categorical exclusions of relevant evidence*.[129] This means that it is error—an abuse of discretion in the most basic sense—for a court system to view an identified class of evidence as particularly suited to exclusion under FRE 403 or its state-law analogues. It is one thing for a court, or for many courts in many decisions, to apply 403-balancing rules to exclude gory photographs. But that is a different thing than saying, "We generally view gory photographs with suspicion under FRE 403." All evidence is reviewed, or at least theoretically reviewable, under 403-balancing rules. But by identifying a particular category, a court implies that that category is somehow special or different and deserving of categorical treatment that judges must be "on the alert" for. The only purpose in recognizing a category and connecting that category to a 403 balance is to suggest that the category is more likely to fail the balancing test and be excluded. In any event, 403 is not a rule of generalizations but a rule of particulars that properly views every case as different. Generalizing a 403 balance defies both the intended case-by-case nature of 403 rules, and, the other side of the coin, the rejection of categorical judicially created exclusions.

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127. *See* FED. R. EVID. 407, 412–15.

128. *See* FED. R. EVID. 801, 404, 702.

129. *Cf.* Imwinkelried, *supra* note 112, at 888, 905 (arguing that FRE 403 does not permit exclusions of relevant evidence to further a social policy extrinsic to rational jury decisionmaking).

B. Misuse of FRE 403 to Address Credibility Concerns

The foregoing argument shows that FRE 403–type rules are inappropriate vehicles for a categorical approach to exclusion of relevant evidence, in general. In considering the appropriateness of applying FRE 403 to third-party guilt evidence—whether under the name of the "direct connection doctrine" or something else—we must also remember an additional point: the witness is supposed to be assumed credible, lest the judge usurp the jury's role in making an FRE 403 ruling.[130]

The abolition of the interested-party competency exclusion is particularly significant to the question of third-party guilt evidence. A frequent concern stated by courts in disfavoring third-party guilt evidence is the purported ease with which such evidence can be "fabricated." This, of course, is the exact same policy rationale that justified the now-abolished prohibition on parties testifying as witnesses. Lying is easy, and parties have a powerful incentive to lie—so the theory goes. But modern evidence codes disapprove the idea that judges should take it upon themselves to guard juries from fabrication risk. FRE 601 treats the risk of lying witnesses no differently than the other so-called testimonial risks of faulty perception, memory, or narration, which are all matters for the jury. As the Advisory Committee put it, "Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility *and require no special treatment* to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses."[131] Moreover, in a system that gives credibility issues to the jury, it is extremely problematic to identify a particular category of evidence as raising a special risk of duping the jury. The implicit claim of direct connection doctrines that third-party guilt evidence is particularly likely to dupe the jury is dubious as an empirical matter.[132]

Even if lying witnesses were to be screened out by the judge—which they manifestly are not—the structure and purpose of FRE 403–type rules make them particularly unsuited as vehicles for

130. *See supra* note 126 and accompanying text.

131. FED. R. EVID. 601 advisory committee's note (emphasis added).

132. Indeed, some defense counsel see the third-party guilt evidence as taking on a significant risk. Once such evidence is introduced, a jury might implicitly shift the burden of proof to the defendant to show the third party's guilt, despite jury instructions to the contrary; and if that burden is not met, the jury might hold the evidentiary shortfall against the defendant. One of Steven Avery's lawyers, Dean Strang, stated that because of that burden and risk, it is a "huge decision" to put on a third-party guilt defense. Telephone Interview with Dean Strang, Partner, Strang Bradley LLC (Feb. 19, 2016).

screening out evidence deemed to have a high fabrication risk. To begin with, the 403 balancing test weighs the probative value of evidence. This is a function of the need for the evidence and its logical tendency, *if true*, to alter the probabilities of other facts of consequence. Such evidentiary strength is not correlated to the risk of fabrication. There is no reason to suppose that big lies are harder to tell—that is, rarer—than small ones, and a rule aimed at screening out lies should be more concerned with big ones. Yet big lies, if believed, will have more probative value and will thus fare better in a properly conducted 403 analysis. Again, 403 rules assume the truth of the evidence offered. Accordingly, in principle, FRE 403 can't be used to screen out fabrications precisely because it is meant to preserve the jury's control of that function. For this reason, we see that *fabrication risk is not one of the recognized 403 dangers*.[133]

Indeed, fabrication risk is not a thematic concern of evidence codes at all. As noted above, the structure of modern evidence codes is to provide that all relevant evidence goes to the jury, subject to specified statutory or codified policy-based exclusions. The exclusions are for the judge to determine, and under FRE 104(a), preliminary facts determining the applicability of exclusionary rules are determined by the judge by a preponderance of the evidence.[134] The judge may assess witness credibility in this limited context—to determine whether an offered item of hearsay is inadmissible or should be admitted under an exception, for example. But that is only because the offered item may prove to be inadmissible and the preliminary facts determining its admissibility are not required to be admissible.[135] In other words, FRE 104(a) protects the jury from hearing *inadmissible* evidence, not purportedly *false* evidence.

C. The Direct Connection Doctrines as a Coalesced FRE 403 Balance

It might be urged that the foregoing argument, whatever its applicability to the use of FRE 403 as a cover-up for disguised variants of a direct connection doctrine, does not apply to *the* direct connection doctrine. Certain categorical rules restricting the admissibility of

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133. *See* Imwinkelried, *supra* note 112, at 893–94 (list of FRE 403 dangers is exhaustive, excluding unenumerated dangers).

134. FED. R. EVID. 104(a).

135. *See Bourjaily v. United States*, 483 U.S. 171, 177–78 (1987). Thus, the only places where a fabrication risk is implicitly identified in the federal rules are with certain hearsay exceptions. *See* FED. R. EVID. 803(6) (business records exception); FED. R. EVID. 803(8) (public records exception); FED. R. EVID. 804(b)(3) (requiring corroboration for hearsay statements against the penal interest of an unavailable declarant).

relevant evidence could be said to represent the result of an FRE 403 balancing applied systematically over time until it coalesces into a general rule. FRE 404 has been aptly described in that fashion.[136] The rule against character evidence represents the judgment of common law courts over many years that such evidence typically has low probative value that is almost invariably outweighed by 403-type dangers.[137] The main problem with character evidence is that juries tend to overweight it, so that it is misleading.[138] And where character is proven by past specific acts, there is a danger of confusion of issues if the past acts are disputed.

Can an explicit direct connection doctrine be justified as the coalescing of a repeated 403 balance, in the manner of FRE 404?[139] Viewing the direct connection doctrines this way would address the objection, argued above, that FRE 403 balancing cannot be done categorically rather than case-by-case. But conceptualizing direct connection doctrines as a coalesced 403-type balance would not address the other objections. The direct connection doctrines would still be a type of judicially created policy-based exclusion, which is impermissible under the FRE and its state-law analogues. Moreover, to the extent that the direct connection doctrines are justified as addressing fabrication risk, the objection would still remain that 403 balancing—

136. *See, e.g.*, 22B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5232 (1st ed. 1978) ("[404(b)] principles have crystallized out of decades of weighing by courts of the relevance of the evidence against such countervailing factors as prejudice and confusion of issues."); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1524–25 (1999) (FRE 404 "particularize[s] the general standard of Rule 403 with reference to recurrent issues" relating to character evidence); *see also United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982) ("Although this 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged -- or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment -- creates a prejudicial effect that outweighs ordinary relevance.").

137. Perhaps the hearsay rule and its exceptions could be theorized a coalescence of a balance of probative value versus exclusionary policies. But the policies for excluding hearsay are not primarily 403-type dangers but rather a policy favoring live witness testimony.

138. *See* Imwinkelreid, *supra* note 4, at 100 & n.78 ("Psychological studies generally support the conclusion that laypersons overestimate the probative value of a person's character in predicting the person's conduct.").

139. *Cf.* Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423, 433 & n.37 (2015) (suggesting that evidence rules, including FRE 403, should be employed by judges to recognize economies of scale through generalizable exclusion rulings in order to promote efficiency). Stein's argument does not address the objections made here, that such efficiency arguments must be addressed to legislatures rather than courts. Nor does he address the instance of third-party guilt evidence, where case-by-case decisionmaking may increase accuracy to an extent that would satisfy the cost-benefit criteria of law and economics theorists.

whether case-by-case or in the form of a coalesced, categorical rule—should not be applied to misappropriate the jury's function of determining credibility.

Even aside from these problems, to justify direct connection doctrines as a coalescing of predictable and categorical 403 dangers assumes that there are cognizable 403 dangers stemming from third-party guilt evidence *as a category*. In other words, this justification assumes that third-party guilt evidence *as a category* is more prone to raising 403 dangers than most other types of evidence.

Is there any reason to believe this? The case law provides no convincing support but simply repeats such untested empirical assertions as "speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice."[140] Clearly, the courts are relying on untested intuition to resolve an empirical question. But as we show in the following section, rational intuition indicates that third-party guilt evidence is *less*, not more, apt to be excludible under a proper application of FRE 403. Absent empirical proof that that rational intuition is wrong, neither courts nor legislatures would have a sound basis to conclude that the direct connection doctrines are justifiable as a coalesced 403 balance. And because the starting point for analysis is the general principle that "all relevant evidence is admissible,"[141] the argumentative burden of proof to justify a rule restricting admissibility must lie with the rule's proponents.

D. The Misapplication of the Balancing Test in FRE 403 Jurisdictions

The foregoing section argued that direct connection doctrines cannot be justified as a kind of 403 balance, either case-by-case or coalesced into a categorical rule, if the "danger" is a fabrication risk—because fabrication is not a recognized 403 danger. But what about the acknowledged 403 dangers?

In this section, we examine whether it is justifiable to view third-party guilt evidence as categorically more likely to raise 403 dangers than other types of evidence. If the answer is no, then we can see the error in the approach taken by those jurisdictions that purport to apply proper 403 balances to third-party guilt evidence but do so categorically by treating it as a specially 403-risky category. Further, if the answer is no, direct connection doctrines cannot be justified in their

140. *United States v. Settle*, 267 F. App'x 395, 398 (5th Cir. 2008); *accord United States v. Jordan*, 485 F.3d 1214, 1219 (10th Cir. 2007).

141. FED. R. EVID. 402.

full-bore forms as a categorical, coalesced rule purporting to balance 403 dangers.

FRE 403 and its state-law analogues raise two categories of dangers. The risks to jury reasoning are described as "unfair prejudice," "misleading the jury," and "confusion of issues."[142] The risks to trial efficiency are characterized as "undue delay," "waste of time," and "needless presentation of cumulative evidence."[143] In undertaking this analysis, we will examine the jury reasoning risks individually and the efficiency risks collectively under the heading "waste of time."

1. CONFUSION OF ISSUES

The inapplicability of this 403 danger to third-party guilt evidence is manifest. "Confusion of issues" refers to evidence that suggests to the jury that it must resolve a factual dispute that in actuality is tangential to the central issues in the case. This problem seems inevitably to arise with third-party guilt evidence because the purported guilt of the third party will always be contested: hence a trial about the defendant's alleged guilt will be "confused" with a trial about the third party's alleged guilt.

But in a criminal case where the occurrence of the crime is conceded and the defendant claims that he is not the perpetrator, the question of "who did it" is the central, indeed the only issue, in the case. Evidence tending to show that a person other than the defendant committed the crime is always relevant to that central question. To suggest that such evidence *confuses* the issues is so illogical that it warrants an automatic reversal where a court excludes third-party guilt evidence on this basis.

Some courts may make this confused statement by attributing the prosecution's burden to the defendant or otherwise confusing relevance with sufficiency of the evidence. Whether the third party is *probably* guilty (or guilty beyond a reasonable doubt) is not at issue because the defendant does not have to prove that in order to win acquittal. But the low burden for acquittal does not make the question of third-party guilt *irrelevant*.

A genuine "confusion of issues" danger is absent even though the evidence of third-party guilt is disputed and will thus result in a so-called "mini-trial" of the third party. Disputes over whether a third party had the motive or opportunity to commit the crime go directly to whether someone other than the defendant committed the crime. To

142. FED. R. EVID. 403.

143. *Id.*

analyze such evidence as potentially confusing the issues is to say, in essence, that the commission of the charged crime by someone else is tangential to the question of whether the defendant committed the charged crime. It is quite simply illogical to say, "The question before us is whether the defendant committed the crime beyond a reasonable doubt, not whether someone else may have committed the crime." Those are the same question.

There are two special cases of a potential confusion of issues when certain types of third-party guilt evidence are offered. These, however, do not render the entire category of third-party guilt evidence worthy of special, categorical scrutiny under FRE 403.

a. Third-party accomplices

A defendant's evidence tending to inculpate a third party does not necessarily *rule out* the defendant's involvement if the third party was an accomplice. In most such cases, however, the fact that the defendant had an accomplice would be known to the prosecution and would be incorporated into the prosecution's theory of the case. Evidence offered by the defendant tending to shift blame onto the accomplice would therefore be relevant and not at all tangential. Only if all of the substantive charges hold the defendant constructively responsible for the acts of the accomplice might it be argued that such blame-shifting evidence is immaterial.

More typically, however, the defendant will offer evidence suggesting that the third party, and *not* the defendant, committed the crime. Suppose that the prosecution responds by arguing, without evidentiary support, that the defendant's evidence does not "rule out" his guilt because the defendant and the third party "may have been" accomplices. Such an argument does not make the third-party guilt evidence tangential to the core issue of the case. It is not the defendant's burden to "rule out" his guilt but rather the prosecutor's to eliminate reasonable doubt. In this instance, it is the prosecutor's speculation about a third party's cooperation with the defendant that should be inadmissible. Not only does such speculation by the prosecutor lack foundation, but it also confuses the issues for the prosecutor to speculate about alternative theories of liability that are not embraced in the prosecution's theory of the case. It makes no sense to exclude the defendant's offer of probative evidence under 403 because of some likelihood that the *prosecution's response* will confuse the issues.

b. Other acts evidence

The one circumstance in which a genuine confusion of issues may arise in this context is where third-party guilt evidence consists of past specific acts of the third party other than the crime in question. In several cases, for example, a rape defendant offered evidence of other rapes committed by an alternative suspect. Such evidence could confuse issues if the jury were asked to decide factual disputes surrounding the circumstances of those other crimes or the identity of their perpetrator. Undoubtedly, it is spillover from this type of case that has unduly associated all third-party guilt evidence of any type with 403 problems.

To justify heightened skepticism toward third-party guilt evidence in this form requires a showing that the evidence is more likely to confuse issues when offered by a defendant to show third-party guilt than when offered for other purposes. Where the other acts are offered for a recognized non-character purpose such as "motive, opportunity, intent, preparation, plan, knowledge, [or] identity,"[144] courts routinely balance the probative value for the permissible purpose against the FRE 403 dangers.[145] But there is no reason to view the 403 dangers as worse, or to look for some heightened standard of probative value, in third-party guilt evidence situations than others. No court or commentator we know of has even attempted to make such a showing at all, let alone to do so convincingly.

On the contrary, in third-party guilt cases, the risk of confusion of issues is likely to be *lower* than usual. Typically, a defendant's own prior bad acts are admitted against him despite a substantial risk of bad-person prejudice and misuse of the evidence to draw an impermissible propensity inference.[146] As a result, a defendant will have a powerful incentive to dispute all evidence of prior bad acts, creating a significant mini-trial risk. In contrast, the prosecution's incentive to dispute prior bad acts of third parties is positively correlated to the probative value of the evidence. If the prior bad act evidence is weak, the prosecution can more safely dismiss it as a distraction and argue the strength of its case-in-chief. The prosecution's incentive to create a mini-trial on third-party guilt rises as such evidence is stronger: the risk of confusion of issues is highest only where the probative value is highest toward raising doubt about the defendant's guilt. Yet direct connection doctrines are designed to

144. FED. R. EVID. 404(b)(2).

145. *See infra* Part II.D.2. It is also true that third-party witnesses are routinely impeached with their past specific acts deemed relevant to show a character for untruthfulness. However, the rules limit the scope of potential jury confusion by prohibiting extrinsic evidence of such acts. *See* FED. R. EVID. 608(b).

146. *See, e.g.*, *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

exclude weaker, not stronger, third-party guilt evidence. FRE 403 balancing mandates exclusion only where the probative value is substantially outweighed by the 403 danger. Here, any confusion-of-issues danger will be low when probative value is low and high only where probative value is high—in either case, defeating the argument for exclusion under a proper 403 balance, which is supposed to tilt heavily in favor of admission. Therefore, confusion of issues is not, generically, a ground for excluding "other acts" third-party guilt evidence under a 403 balance.

2. UNFAIR PREJUDICE

"Unfair prejudice" refers to a tendency of evidence to be used against a party either (1) irrationally or (2) rationally but in violation of the rules of evidence. *Irrational* unfair prejudice is seen as resulting from evidence whose force comes primarily from producing emotional, moral, or other sorts of reactions rather than from its logical tendency to change the probabilities of facts of consequence. Common examples include gory crime-scene photographs that might make a juror want to punish someone irrespective of whether the prosecution has met its burden of proof and past-specific-acts evidence that makes a juror think a party is a bad person who deserves punishment (or is undeserving of a civil remedy) irrespective of proof of the actual issues in the case.

The risk of *rational* unfair prejudice arises where evidence is admissible for one purpose but inadmissible for another, despite its relevance. For example, a prior bad act may be admitted for a non-character purpose to show motive, intent, plan, etc., but it will nevertheless always be relevant (even if inadmissible) to show a pertinent character trait for bad conduct. A court might allow evidence showing that an armed robbery defendant burglarized a pawn shop two weeks prior to the robbery to steal the gun subsequently used in the robbery: it would be admitted to show "opportunity" or "plan" with respect to the charged robbery.[147] But a jury could rationally consider the pawn-shop burglary as relevant to show that the defendant has a character trait for committing theft crimes and is therefore at least slightly more likely to have committed the robbery. Though rational, the inference is prohibited by FRE 404(a) and (b)(1).[148] The rational but prohibited use of the evidence raises a risk of unfair prejudice.

Plainly, neither of these unfair-prejudice concerns is present in third-party guilt evidence *as a category*. There may be individual circumstances where an offered item of third-party guilt evidence is

147. *See* FED. R. EVID. 404(b)(2).

148. FED. R. EVID. 404(a)(1), (b)(1).

non-hearsay that could be used for an impermissible hearsay purpose or past-acts evidence that could be used for an inadmissible character purpose. But there is nothing about third-party guilt evidence that makes it more likely than other evidence to be offered in forms that raise such problems or to be more unfairly prejudicial when offered. The suggestion that a third party committed the crime is not somehow unusually explosive or unusually likely to trigger extreme emotional, anti-prosecution responses in jurors. If that were the case, it would be hard to see how FRE 403 could permit defense counsel to do anything to raise a reasonable doubt, since all such doubt evidence—including impeachment of prosecution witnesses—implies that a third party is the true perpetrator.[149]

If any categorical generalizations were to be made, the risk of unfair prejudice is *less* in the case of third-party guilt evidence than others. In typical 403 situations, the evidence is offered against a party or a witness closely associated with a party. Any bad-person prejudice is likely to be held against a party. With third-party guilt evidence, such potential bad person prejudice is siphoned away from the parties, mitigating that aspect of unfair prejudice, at least.[150]

To the extent that courts ever speak in terms of third-party guilt evidence raising a risk of unfair prejudice, they are either conflating the term with jury-confusion or jury-misleading, or they are really referring to procedural prejudice. To be sure, third-party guilt evidence can complicate the prosecution's case by giving the prosecution a set of facts to rebut in order to prevent the emergence of a reasonable doubt. In some instances, prosecutors might feel blindsided by defense theories that they have had insufficient opportunity to investigate prior to trial.

But FRE 403 and its state-law analogues are not intended to weigh claims of procedural unfairness of this sort.[151] They are certainly not well-designed for it. Notice and discovery requirements are generally stated expressly in procedural codes and in a handful of evidence rules. A judicially created rule requiring notice of certain types of defenses

149. It is interesting, and telling, that courts generally have erected no special barriers under 403 or any other rule to defense attacks on the integrity of the prosecution's investigation, as recently shown by Professor Imwinkelreid. *See* Imwinkelreid, *supra* note 4 *passim*. As Professor Imwinkelreid argues, such defenses imply the guilt of an unidentified third party, and he therefore identifies such defense cases as "SODDI 2.0" defenses.

150. FRE 403 is concerned with prejudice stemming from effects on the jury's inferential reasoning process and not with extrinsic policy concerns, such as third party reputational rights. *See* Imwinkelried, *supra* note 112, at 893–94, 897. We address the question of third-party reputational rights below. See *infra* Part IV.C.

151. *See* Imwinkelried, *supra* note 112, at 894 ("[A] judge can exclude logically relevant evidence under rule 403 only on the basis of one of the listed factors.").

(such as a third-party guilt defense or an alibi defense) may or may not be a good thing, though it is worth noting that among the justifications for direct connection rules, lack of notice is rarely, if ever, given. In any event, making admissibility of evidence dependent on its probative value seems like an odd way of expressing a notice requirement. The lack of notice is the same whether the evidence is strong or weak; and the "prejudice" to the prosecution is worse where the evidence is strong; but under direct connection doctrines, courts purport to exclude weaker third-party guilt evidence.

3. MISLEADING THE JURY

Misleading the jury encompasses two problems. One is a risk of creating inferences known to be false by presenting evidence out of context. An example of this is found in *United States v. Hitt*,[152] where the defendant was being prosecuted for unlawful possession of a machine gun. The prosecutor offered a photograph of Hitt surrounded by guns of various kinds and holding the gun in question. The prosecution argued that the photo showed the gun's purportedly clean exterior condition prior to Hitt's arrest. A key issue in the case was whether Hitt had modified the gun to make it rapid-fire as a machine gun and whether he had kept its internal workings clean (since the defense claimed it rapid-fired when tested by the government due to malfunction caused by internal dirt).[153] The Ninth Circuit held that the photograph should have been excluded under FRE 403. This was not merely a question of possible "bad person" prejudice. The court reasoned that the jury could have rationally inferred that an owner of so many guns was more likely (than without evidence of the other guns) to know how to keep its internal workings clean and how to alter the rifle to make it rapid fire. But Hitt was not the owner of the other guns—they belonged to a friend.[154] The implication that Hitt was the gun owner is thus a core example of a danger of misleading the jury: the evidence, taken out of context (because presented out of context), created a false but rational inference.

As this example shows, the misleading quality of evidence is theoretically fixable by providing more context—that is, facts that will obviate the false inference. Certainly, the 403 danger of misleading the jury can be eliminated in some cases and the evidence admitted. But in other cases, such facts may not be available. Or, even if available, they might not suffice to offset the misleading impression. Or the additional

152. 981 F.2d 422 (9th Cir. 1992).
153. *Id.* at 423.
154. *Id.* at 424–25.

context facts might create a danger of confusion of issues. In *Hitt*, perhaps there would have been a factual dispute over who owned those guns in the background.

It is fair to say that there is a high likelihood of missing context with third-party guilt evidence. A full context would, in effect, require a defendant to present probable cause that the third party should be arrested and charged with the crime—a burden that would be exceedingly difficult for a defendant to meet and one that should, at least in theory, cross any existing direct connection threshold. Certainly, such a burden far exceeds the reasonable doubt threshold.

Does this make for a likelihood of misleading the jury that would sustain a systematic application or coalescence of an FRE 403–type rule against third-party guilt evidence? The answer is no, though the argument is subtle. The misleading risk is that the defendant will offer evidence raising a "mere suspicion" of third-party guilt. A mere suspicion means that the evidence raises a relatively low probability that the third party is guilty—certainly less than "probably guilty." This would be misleading if the jury were being asked to infer the probable guilt of the third party on "mere suspicion"–caliber evidence. It would ask the jury to make an unsupported, probably false inference. But that's not the inference the jury is asked to make. Reasonable doubt is a *possibility* that the defendant is not guilty, not a probability that he is innocent. If the standard were the latter, criminal cases would be decided by a preponderance of the evidence standard.

If defense counsel knew the evidence was in fact false—knew his client and not the third party was the perpetrator—the evidence would be misleading. But not otherwise. And the problem of false evidence, as we have argued, is not an FRE 403 concern. Misleading the jury arises from presumptively true evidence giving rise to false inferences. Here, the inference from mere-suspicion evidence to a belief that a third party *might* have committed the crime is not a false inference. Rather, it has a tendency to support a reasonable doubt. Requiring a more certain inference from the jury, in effect, imposes an impermissible burden of proof on the defendant.

One might say that if the defendant were known to be guilty, then any evidence attempting to shift guilt onto someone else is inherently misleading because it would ask the jury to draw a false inference—that the defendant is not guilty. It may be that some courts view the matter this way. But we hope the glaring, fatal flaw in such an argument is apparent. Only by prejudging the defendant's guilt—assuming what the prosecution is trying to prove—can the court find that third-party guilt evidence is misleading on this analytical path. If a judge could exclude defense evidence on her belief that the defendant is guilty, then she could dispense with the defendant's case-in-chief, dispense with

impeachment of prosecution witnesses, and for that matter, dispense with the jury in any given case. It might also be observed that if the defendant were not guilty, then the prosecution's entire case would be misleading the jury in precisely the same way.

Finally, it might be argued that the prosecutor would be unduly burdened by having to demonstrate the misleading quality of the defendant's third-party guilt evidence with potentially extensive factual context. But, unless defense counsel knows the evidence to be false, this is not an objection based on the potential to mislead the jury. This simply restates the "confusion of issues" problem, which we have already discussed.

A second risk sometimes associated with the "misleading" danger is that the jury will give the evidence too much weight, that is, will exaggerate the probative value of the evidence. We view this as an impermissible use of FRE 403. Whatever might be said for such a gatekeeping approach with regard to expert testimony, the weight to be given an item of evidence is normally for the jury.[155] Jurors "are not so easily duped" by weak third-party guilt claims.[156] In Wigmore's classic statement, "if the evidence is really of no appreciable value, no harm is done in admitting it."[157] If jurors are incapable of distinguishing different degrees of probative value of a common-sense (i.e., non-expert) item of evidence, then they are incapable of judging whether the cumulative weight of the evidence presented to them meets any particular burden of persuasion, including reasonable doubt itself. It is logically inconsistent to deem jurors incapable of appropriately weighing a single item of evidence while at the same time somehow capable of weighing all the evidence in the entire case. The jury system is premised on the belief that juries are capable of properly weighing the evidence.

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155. *See, e.g.*, *Reeves v. Sanderson Plumbing Prod. Corp.*, 530 U.S. 133, 150 (2000) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986))). Although Professor Imwinkelried argues that FRE 403 properly applies to such over-weighting risk, the only example he produces is the "assum[ption] that lay jurors overestimate the objectivity and certainty of scientific testimony." *See* Imwinkelried, *supra* note 112, at 895.

156. Blume et al., *supra* note 7, at 1085–86; *see also* Hayes, *supra* note 96, at 538–39 (discussing *Winfield v. United States*, 676 A.2d 1, 7 (D.C. Cir. 1996) (en banc), which warned against "excessive mistrust of juries").

157. Powell, *supra* note 57, at 1031 (discussing Wigmore's theory that no harm is done in admitting weak, speculative evidence).

4. WASTE OF TIME

FRE 403 identifies three efficiency dangers, "undue delay, wasting time, or needlessly presenting cumulative evidence."[158] But the title of the rule focuses on "waste of time," and so will we—to save time. The three dangers are largely synonymous.[159]

The argument that evidence of third-party guilt is excludable because it is a waste of time is breathtaking in its disregard for a criminal defendant's due process rights. Reviewing the cases in which this idea has been applied, one never sees a serious indication about the actual time involved in presenting the evidence. In some cases, it seems as though the offered evidence comes from a single witness whose testimony, we might estimate, is likely to take an hour or less.[160] How much time is too much for a defendant to offer evidence that someone else may have committed the crime? Given the centrality of the identity issue to the cases we are discussing, it is hard to imagine the time spent on this issue being undue, at least in routine cases. The application of a waste-of-time rationale seems particularly paradoxical, given that it is more likely to be applied to weaker, thinner, less time-consuming evidence.

The waste-of-time justification for direct connection boils down to the idea that "courts have no time for weak defense evidence." If this is a principle, it is hard to imagine a limitation to it. If a court has no time to hear a defense witness testify briefly about a third party's motive to commit the crime, why does it have time to hear a short cross-examination of a police forensics expert to show sloppy lab work? Why does it have time to hear any impeachment evidence? For that

158. FED. R. EVID. 403.

159. In this, we follow Judge Posner, who observes that "waste of time" "seems synonymous with 'undue delay' and 'needless presentation of cumulative evidence.'" Posner, *supra* note 136, at 1523. If "undue delay" means something different from "waste of time," the differences hardly warrant the time to identify and explain them. Likewise, "cumulative evidence" is excludable because it wastes time, and, in any event, it assumes that evidence on the same point has already been admitted. The problem with the direct connection doctrines is the exclusion of any evidence, not repetitive evidence, of third-party guilt. Notably, the California Evidence code refers simply to "undue consumption of time." CAL. EVID. CODE § 352.

160. *See State v. Donald*, 316 P.3d 1081, 1090–91 (Wash. Ct. App. 2013) (upholding the lower court's decision to exclude an expert witness's testimony regarding third party, because the lower court "expressed a reasonable concern about the confusion of issues and possible delay"), *review denied*, 325 P.3d 914 (Wash. 2014); *People v. Elliott*, 269 P.3d 494, 532 (Cal. 2012) (affirming the lower court's decision to exclude evidence of four past acts of the third party, because the lower court could reasonably find that the probative value of the evidence was "substantially outweighed by the undue consumption of time required for its presentation").

matter, why is there time allowed for any cross-examination at all, at least if the cross-examination is weak?

The point is that all of these defense presentations are designed to raise a reasonable doubt, and in the context we're discussing, this means suggesting that someone other than the defendant committed the crime. If courts have no time for weak evidence of this sort, it is hard to see why they have time for weak defense evidence of any sort—in which case, the right to confront adverse witnesses can be made subject to a court's discretionary judgment that the impeachment or other cross-examination is not likely to be effective enough to spend time on. Such an extremely dangerous judicial interference with the right to confrontation and to trial by jury in criminal cases was certainly not within the contemplation of FRE 403.

Given the relevance of third-party guilt evidence to the central issue in the case, a waste-of-time-based 403 ruling should be automatically reversible absent the most extreme, case-specific circumstances.

5. CONCLUSION

The foregoing discussion raises significant challenges to any attempt to justify the direct connection doctrines on FRE 403 grounds. The FRE 403 dangers are not categorically greater for third-party guilt than other types of evidence; if anything, they are likely to be less. This point further undermines the justifications for full-bore direct connection doctrines as "coalesced" FRE 403 rules, as well as for categorical disfavored treatment of third-party guilt evidence under the guise of applying 403 rules directly, case-by-case. As we argued in Part I, many courts purporting to apply an FRE 403–type balancing test are in reality applying a direct connection substitute: a general doctrine disfavoring third-party guilt evidence under the guise of FRE 403. Telltale signs of such an approach include underweighting the probative value of the evidence, overweighting the 403 dangers, failing to consider the defendant's need for the evidence, or failing to undertake the balance at all. The most common, telltale sign of using 403 as a screen for a direct connection doctrine is when courts base their purported 403 balancing analysis on *broad generalizations* about probative value or 403 dangers rather than examining them in a genuinely case-specific context. As we have shown in this section, the generalizations about the 403 balance are exaggerated or at times illogical. Finally, it is worth noting that the 403 balance requires that the dangers must *substantially* outweigh probative value to warrant exclusion. The 403 balance is supposed to strongly favor admissibility, consistent with modern evidence codes' "strong and undeniable

preference for admitting any evidence having some potential for assisting the trier of fact."[161] FRE 403–type decisions excluding third-party guilt evidence seem to reverse this balance.

III. DIRECT CONNECTION AS A FOUNDATION RULE

The direct connection doctrines have also been conceptualized as a foundation rule.[162] In this section, we show that direct connection doctrines are at odds with modern evidence codes' treatment of foundation and can't be justified on that basis.

A. Foundation Rules and Fabrication Risk

We have shown that FRE 403 is an inappropriate vehicle to address fabrication risk presented by evidence. Is fabrication risk a proper subject for foundation rules—FRE 602, 901, 104(b), and their state-law analogues? In other words, can direct connection doctrines be justified as a specific application of a general principle of foundation? This argument is easily dispensed with: no, they can't.

The short and dispositive answer is that foundation rules are not designed to address fabrication risk, the generic possibility that any given witness may be lying. As shown above, foundation rules ask only whether a reasonable jury could believe that the offered evidence is true and relevant. But the judge must not use foundation rulings to usurp the jury's power to determine credibility. A foundation witness might be lying, but his foundation testimony is taken at face value—assumed true by the judge—because credibility questions are for the jury.[163]

The most that might be said about foundation rules' concern over evidence fabrication is that FRE 901 bears a residual trace of the common law concern over forged documents.[164] The rule refers to "authenticating" items of evidence and to "genuine" handwriting, for example.[165] But this concern does not extend to the question of

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161. *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 780 (3d Cir. 1996) (quoting *DeLuca v. Merell Dow Pharm., Inc.*, 911 F.2d 941, 956 (3d Cir. 1990)).

162. *See State v. Hokanson*, 821 N.W.2d 340, 350–51 (Minn. 2012) (equating direct connection showing with "a proper foundation for admission of [third-party guilt] evidence"); Edward J. Imwinkelried, *The Reach of* Winship*: Invalidating Evidentiary Admissibility Standards that Undermine the Prosecution's Obligation to Prove the Defendant's Guilt Beyond a Reasonable Doubt*, 70 UMKC L. REV. 865, 885–86 (2002) (connecting admission of third-party guilt evidence to the foundation standard under FRE 104(b)).

163. *See supra* Part III.A.

164. *See* David S. Schwartz, *A Foundation Theory of Evidence*, 100 GEO. L. J. 95, 105–06 (2011).

165. FED. R. EVID. 901.

fabricated testimony. We care that a document is "fair and accurate" or that a signature is not forged to the extent that the document's depictive accuracy, or the identity of its author, makes the document relevant to the case.[166] In any event, such genuineness need only be established by the testimony of a witness, *which itself must be accepted as true*.[167] A witness who purports to have firsthand knowledge that "this document is not a forgery" must be deemed credible by the judge for purposes of both FRE 602 (the firsthand knowledge requirement) and FRE 901 (authentication). Whether he's lying about *that* is for the jury to decide.

B. Foundation Rules Versus Substantive Sufficiency Thresholds

A fundamental error of the direct connection doctrines is that they confuse relevance with sufficiency. One of the most basic tenets of modern evidence law is the primacy of this distinction: relevance is not sufficiency. In the old "a brick is not a wall" homily, relevance is the brick, sufficiency is the wall. And the test of admissibility is relevance. The failure of a sufficiency test justifies judgment as a matter of law against the party bearing the burden of production. If the plaintiff or prosecutor fails to produce evidence sufficient to support a finding that one of the essential elements of its claim is true, then the claim must be dismissed; no (further) evidence on that claim will be admitted at trial. But the failure of a particular offered item of evidence, by itself, to meet that burden of production is *never* a valid basis to exclude that item of evidence.

Foundation rulings are *analogous* to a sufficiency test but stop far short of that. When the rule of foundation refers to "evidence sufficient to support a finding that the item is what the proponent claims it is,"[168] the "claim" is a claim that the offered item is relevant. This means that the offered item makes another factual proposition in the case more likely, and not that it *proves* another factual proposition in the case—such as an essential element.[169] Suppose in a homicide prosecution the prosecutor offers evidence that the victim had stolen money from the defendant's friend. The prosecution's theory is that this prior act created a revenge motive in the defendant. The existence of the motive by itself hardly proves anything. The theft of money from the defendant's friend would have raised a similar revenge motivation in others (the friend himself as well as other friends and relations). And most people refrain from acting on revenge motives by committing

166. *Id.*
167. *Id.*
168. FED. R. EVID. 901(a).
169. *See* Schwartz, *supra* note 164, at 126–27.

homicide. Nevertheless, the motive makes it very slightly more probable that the defendant committed the homicide, and that's all the relevance standard requires.

So what is the foundation standard at work? The "claim" for foundation purposes under FRE 901 is merely that the defendant had a motive to take revenge on the victim. It is not the ultimate claim that he acted on the motive and committed homicide. Therefore, the court should admit the motive evidence if there is evidence sufficient to support a finding that the defendant *had the motive*—i.e., that a reasonable jury could believe that the victim stole money from a person and that person was a friend of the defendant. Admission of the evidence does not depend on evidence sufficient to support the ultimate finding of homicide. Foundation rules admit the brick into evidence on a showing that "this is a brick." The brick is not excluded because it fails to constitute the wall. The evidence need only be relevant and need not by itself "prove" anything.

These are hornbook concepts. It is therefore surprising that direct connection courts seem systematically to ignore them. But the fact is undeniable that the full-bore direct connection doctrines found in thirty-one states are all sufficiency tests of one type or another.[170] To require a "direct connection" is to require a showing that exceeds relevance. While relevant evidence need only have "any tendency" to lower the probability of the defendant's guilt, direct connection doctrines require that the evidence establish a "direct connection," "sufficient link," or some similar phrase between the third party and the crime. Thus, for example, even though motive evidence is virtually always logically relevant, most direct connection jurisdictions expressly exclude third-party motive evidence: "evidence that another person had a motive to commit the crime for which a defendant is on trial is generally inadmissible, absent direct or circumstantial evidence *linking* the third person to the crime."[171] More commonly, courts require in more general terms that third-party guilt evidence is inadmissible unless it adds up to something more than mere relevance. Iowa excludes third-party guilt evidence that does not "create more than a mere suspicion that such other person committed the offense."[172] Yet without the evidence, there would be no suspicion at all, so the evidence is relevant; but the direct connection standard clearly makes relevance

170. Even Professor McCord, who defends direct connection doctrines, acknowledges that they are sufficiency tests. *See* McCord, *supra* note 4, at 976–77.

171. *Case v. Hatch*, 731 F.3d 1015, 1041 (10th Cir. 2013) (emphasis added) (discussing New Mexico law); *accord State v. Denny*, 357 N.W.2d 12, 16 (Wis. Ct. App. 1984) (motive evidence inadmissible without additional evidence of "direct connection").

172. *State v. Campbell*, 714 N.W.2d 622, 630 (Iowa 2006).

insufficient for admissibility. Likewise, Virginia imposes a heightened relevance standard, excluding "evidence that merely suggests a third party may have committed the crime charged," while restricting admissibility to evidence that "tends *clearly* to point to some other person as the guilty party."[173] This despite the language of Virginia's relevance rule, which mimics FRE 403 and requires "any tendency" and not a "clear" tendency.[174]

Several direct connection jurisdictions, and even some 403 jurisdictions, formulate their third-party-guilt-evidence rule in part as an admissibility threshold requiring that the evidence "tend to raise a reasonable doubt."[175] This language is ambiguous. If the emphasis is placed on the word "tend," it could be read as implementing a generic relevance standard. Relevance, after all, is defined as having merely a slight "tendency" to make other relevant evidence more probable or less probable than without the evidence. Relevant evidence offered by a defendant must, but need only, have a tendency to affect the probability of other evidence offered in the case with the ultimate effect of making the prosecution's case less probable and raising the level of doubt. If this were all that was meant by "tend to raise a reasonable doubt," the standard would be unobjectionable.

But the phrase is susceptible of a different meaning that *is* objectionable. If the word "tend" is not read in the technical sense in which it is used in FRE 401, it could be understood to mean "capable of raising," or "*sufficient* to raise a reasonable doubt." In this sense, the word "tend" would function as a qualifier expressing the judge's role in a sufficiency test: deciding whether it supports a jury finding, here, a finding of reasonable doubt. Viewed this way, the standard is an impermissible sufficiency test.

Several reasons suggest to us that the phrase "tend to raise a reasonable doubt" is used in the latter sense as an impermissible sufficiency test. First, if the intention were to suggest that third-party guilt evidence is admissible if relevant, just like any other evidence, it makes little sense to articulate a special relevance test for this evidence at all. Second, articulating a relevance test by importing the ultimate standard of proof is unusual and suspicious. Relevance is not elsewhere

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173. *Johnson v. Commonwealth*, 529 S.E.2d 769, 784 (Va. 2000).

174. VA. CODE ANN. § 2:401 (2014).

175. *See, e.g.*, *People v. Hill*, 766 N.W.2d 17, 22 (Mich. Ct. App. 2009) (excluding evidence that "is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial" (quoting *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006))), *aff'd in part, vacated in part*, 773 N.W.2d 257 (Mich. 2009); *State v. Hokanson*, 821 N.W.2d 340, 350–51 (Minn. 2012) (admissible third-party guilt evidence must have "an inherent tendency to connect the alternative perpetrator to the commission of the charged crime").

described as a tendency to meet the burden of proof. The relevance of the prosecution's evidence is never framed as "relevant if it tends to show guilt beyond a reasonable doubt." Third, courts using the word "tend" never attempt to distinguish their third-party guilt doctrine from those that unambiguously impose a sufficiency test. Fourth, in practice, the test with the word "tend" tends to be used to exclude evidence that meets the normal relevance threshold.

Although the direct connection formulations vary, they all ask what the evidence proves, when they should instead be asking merely the two basic relevance questions: whether the evidence (a) is believable in itself and (b) slightly increases the marginal probability that a third party committed the crime.[176] Where the defendant offers evidence of a third party's motive, the proper foundation question is not "does this raise a reasonable doubt," but "can the jury reasonably believe that the motive exists" and "does this have any tendency to increase the degree of doubt (or decrease the marginal probability of guilt)." The direct connection doctrines are all sufficiency tests.

Several commentators have observed that prosecutors are routinely permitted to present evidence of the defendant's motive, even though motive evidence is virtually always weakly probative;[177] whereas courts routinely exclude defendant's evidence of a third party's motive, citing the general weakness of motive evidence.[178] This is more than merely an irony or a violation of a "what's sauce for the goose is sauce for the gander" principle of due process. This is a demonstration of the court's

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176. We use the phrase "*marginal* probability" to make plain in this context that we mean a mere change in the level or degree of probability. "Probability" is ambiguous, in that it has the technical meaning of any degree of probability between 0 and 1 (or 0% and 100%), but also has the common meaning of "the condition of being probable" (i.e., more probable than not).

177. *See, e.g.*, McCord, *supra* note 4, at 975–76 ("However, the standard rule when the prosecution offers evidence of defendant's opportunity alone is that the evidence is always admissible. The same disparity holds true with respect to motive evidence. Since it seems that the point of the proof is the same whether offered by the defense or the prosecution—to prove that a specific person committed the crime—why is the evidence treated so dissimilarly for admissibility purposes depending on which party offers it?").

178. *See People v. Lucas*, 333 P.3d 587, 686 (Cal. 2014) ("[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime."), *reh'g denied* (Nov. 12, 2014), *cert. denied sub nom. Lucas v. California*, 135 S. Ct. 2384 (2015); *State v. Burnett*, 329 P.3d 1169, 1180 (Kan. 2014) ("In other words, without additional evidence showing that a third party could have committed the crime . . . evidence merely suggesting that someone other than the defendant had a motive to commit the crime has little probative value and can be properly excluded at trial.").

failure to distinguish relevance and sufficiency in the direct connection doctrines. Admitting the prosecutor's motive evidence despite its low probative value is a recognition of the low threshold required for relevance. Excluding such evidence when offered by a defendant is a confession that a sufficiency, rather than a relevance, standard is being applied to third-party guilt evidence.

The direct connection doctrines, if conceived as a foundation rule, are doubly erroneous. Not only do they confuse a foundation question for a sufficiency question, but by imposing any sort of sufficiency test at all—requiring that the evidence "prove" something or "rise to some threshold" of proof rather than inquiring simply into its relevance—the courts also place a burden of production on the defendant. And yet a criminal defendant has no burden of production. He is not required to prove anything.[179] Nor should offers of third-party guilt evidence properly be conceived as efforts to prove anything. They merely add something to the degree of doubt, which the prosecutor has the burden of reducing to doubt that is "less than reasonable" or "unreasonable." By creating an implied burden of production on defendants, the direct connection doctrines violate the basic principle placing the burden of proof entirely on the prosecution.[180]

Indeed, even if it were proper (it isn't) to impose a burden of production on the defense to raise a reasonable doubt as a condition to admitting third-party guilt evidence, the courts even then err in applying their direct connection doctrines. Any application of a burden of production must look at all the evidence offered on the point and not dice the evidence up and ask whether individual items or chunks do so separately. But the latter is how courts approach third-party guilt evidence. We have found no cases in which courts consider the impact of the defense's other evidence on the sufficiency or probative value of its third-party guilt evidence. Significantly, impeachment and cross-examination of prosecution witnesses casting doubt on the prosecution's case-in-chief raise the marginal probability that someone other than the defendant is the true perpetrator and thus raise, at least slightly, the marginal probability that the identified third party is the perpetrator. Yet courts excluding third-party guilt evidence never consider its strength in light of the defendant's case as a whole.

Can the direct connection doctrines be justified as a relevance rule? Clearly not. Relevance is an extremely low standard. Relevant evidence must fit the offering party's theory of the case and merely tell the jury something it doesn't already know as a matter of common

179. *See infra* text accompanying notes 227–233.

180. We explain the constitutional dimensions of this error further in Part IV.D, *infra*.

knowledge. In a criminal case, where the burden of persuasion is set at reasonable doubt, this is very little indeed. Any information beyond the jury's general knowledge of the world will suffice; any case-specific information regarding the possibility of third-party guilt should normally suffice. A jury may be able to speculate, as a generalization about the world, that some persons other than the defendant may have had a motive or opportunity to kill the defendant. That goes without saying, in the colloquial sense, and it goes without saying in the formal evidentiary sense as well.[181] Testimony that "other unknown people may conceivably have had a motive to kill the victim" is probably irrelevant. But anything more specific than that meets the low threshold of relevance. Testimony that "a lot of people in the neighborhood hated" the victim (assuming it can overcome a hearsay objection) is certainly relevant—it tells the jury something more than a common-sense generalization that people make enemies. Testimony that a specific person had a specific motive (e.g., the victim owed money to a loan shark) likewise tells the jury something more than a common sense generalization that some unspecified number of people may have had various unspecified motives. Although weak, the evidence is relevant, and cannot be excluded under a foundation rule. Foundation rules are a requirement that evidence be shown relevant and are not rules for the exclusion of relevant evidence.

IV. THE DIRECT CONNECTION DOCTRINES AND CONSTITUTIONAL RIGHTS

We have argued that the direct connection doctrines cannot be justified under general evidence law. The principles of FRE 403–type rules and foundation rules are inconsistent with the direct connection doctrines. And the direct connection doctrines are inconsistent with the underlying policies of modern evidence codes, which give juries the primary responsibility to decide credibility questions and which generally disfavor judicial creation of exclusionary evidence rules.

Nevertheless, a theoretical loophole remains in these principles: a direct connection doctrine might be justified as a free-standing rule and not as a systematic application of an existing 403-type or foundation rule. A legislature could, in theory, itself enact a direct connection doctrine or authorize a court to do so. And some jurisdictions may not, in fact, adhere to a strict policy against judicial creation of rules excluding relevant evidence.

It thus becomes necessary to address the constitutional question: do direct connection doctrines violate a defendant's constitutional right to

181. *See* Schwartz, *supra* note 164, at 115–16.

present a defense? Yes. In this Part, we will show that the direct connection doctrines violate the requirement of *Holmes v. South Carolina*[182] that evidentiary restrictions on a defendant's case be non-arbitrary.

A. The Right To Present a Defense

1. BACKGROUND

Under the Constitution, some evidentiary rules must give way to the defendant's right to present a defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[183] The Supreme Court first recognized this right in *Washington v. Texas*[184] and *Chambers v. Mississippi*.[185] In *Washington*, the Supreme Court struck down a state evidentiary rule that made non-convicted accomplices incompetent to testify for the defense.[186] The *Chambers* Court similarly struck down Mississippi's "voucher" and hearsay rule, which precluded the defendant from offering a third party's confession[187]—interestingly, the same type of evidence excluded in *State v. May*.[188]

Through later cases, the Court carved out a standard for ascertaining whether the defendant's right to present a defense has been violated. While lawmakers have wide discretion under the Constitution to create exclusionary evidence rules,[189] such rules violate the right to present a defense when they "infring[e] upon a weighty interest of the accused"[190] and are "arbitrary or disproportionate to the purposes they are designed to serve."[191]

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182. 547 U.S. 319 (2006).

183. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)) (citations omitted).

184. 388 U.S. 14 (1967).

185. 410 U.S. 284 (1973).

186. *Washington*, 388 U.S. at 23.

187. *Chambers*, 410 U.S. at 294.

188. *See supra* notes 42–44 and accompanying text.

189. *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

190. *Id.*

191. *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

2. *HOLMES V. SOUTH CAROLINA*

In *Holmes v. South Carolina*, the U.S. Supreme Court held that a defendant's constitutional right to present a defense was violated by a state evidence rule that third-party guilt evidence is barred where the prosecution's forensic evidence strongly supports the defendant's guilt. The often-fragmented Roberts Court was notably unanimous in this decision, authored by Justice Alito. In *Holmes*, the state trial court had excluded fairly compelling evidence that an identified third party had committed the rape for which the defendant was charged.[192] The trial court had relied on a decades-old version of the state's direct connection doctrine, to the effect that third-party guilt evidence would be admitted only if it "raise[s] a reasonable inference or presumption as to the defendant's own innocence" but is inadmissible "if it merely 'cast[s] a bare suspicion upon another' or 'raise[s] a conjectural inference as to the commission of the crime by another.'"[193] The state supreme court affirmed but emphasized an even stricter version of its direct connection doctrine articulated in its recent decisions: "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence."[194] The state court affirmed the defendant's conviction and death sentence, holding that the defendant could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence."[195]

The U.S. Supreme Court reversed. Recognizing that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," the Court recognized that this authority had to be balanced against the constitutional guarantee of criminal defendants' "meaningful opportunity to present a complete defense."[196] The Court reaffirmed that exclusionary evidence rules abridge the right to present a complete defense when they are "arbitrary or disproportionate to the purposes they are designed to serve."[197]

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192. Holmes sought to offer third-party guilt evidence that Jimmy McCaw White was the true attacker of the victim, Mary Stewart. His proffer included the testimony of several witnesses who could place White in Stewart's neighborhood at the time of the assault. Holmes additionally had four witnesses who testified that White had either confessed to Stewart's assault or acknowledged Holmes's innocence. Another witness who had been incarcerated with White stated that White had confessed and that employees from the District Attorney's office had asked the witness to testify falsely against Holmes. *Holmes v. South Carolina*, 547 U.S. 319, 323 (2006).

193. *Id.* at 323–24 (quoting *State v. Gregory*, 16 S.E.2d 532, 534 (1941)).

194. *Id.* at 324 (quoting *State v. Holmes*, 605 S.E.2d 19, 24 (S.C. 2004)).

195. *Id.* at 324 (quoting *State v. Holmes*, 605 S.E.2d at 24).

196. *Id.* (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

197. *Id.* (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)).

The South Carolina Supreme Court had, according to Justice Alito, "radically changed and extended" the more common versions of the direct connection doctrine in a way that makes the strength of the prosecution's case the dispositive factor without focusing "on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt."[198] The Court reasoned that "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."[199]

While *Holmes*'s analytical framework makes sense, the opinion offered at most a cursory analysis of direct connection doctrines in general.[200] In striking down South Carolina's especially egregious version of the direct connection doctrine, the Court assumed the rationality of direct connection doctrines as such. Yet even without its kicker of automatically excluding third-party guilt evidence in the face of strong prosecution forensic evidence, the garden-variety remainder of South Carolina's direct connection doctrine was plainly a sufficiency test: one requiring "a reasonable inference or presumption of the defendant's own innocence" and excluding evidence that "merely cast[s] a bare suspicion upon another."[201] But the U.S. Supreme Court did not question the validity of the sufficiency test.

The Court went on to note that FRE 403–type balancing rules were "well-established," "familiar and unquestionably constitutional."[202] It then observed,

> A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. See, *e.g.,* 41 C. J. S., Homicide § 216, pp 56-58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters

198. *Id.* at 328–29.

199. *Id.* at 331.

200. According to Professor Imwinkelreid, the Court did not address the constitutionality of direct connection doctrines as such "because of the way the case was briefed." Imwinkelreid, *supra* note 4, at 94.

201. *See supra* note 193 and accompanying text.

202. *Holmes*, 547 U.S. at 326–27 (*quoting Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986); *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion)).

> offered in evidence for this purpose are so remote and lack [s]uch connection with the crime that they are excluded").[203]

The Court acknowledged that this statement was dicta: "Such rules are widely accepted and neither petitioner nor his amici challenge them here."[204] The dicta is ill considered.

Not having been asked to analyze direct connection doctrines carefully, the Court was not in a position to distinguish them meaningfully from FRE 403–type rules or to consider whether they are justified by non-arbitrary policies. As a baseline from which to judge the unconstitutionality of South Carolina's extreme version of the rule, the *Holmes* Court accepted at face value the often-asserted justification for direct connection doctrines: that they "focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues."[205] Although this aspect of *Holmes* was dicta, lower courts routinely cite *Holmes* as approving direct connection doctrines.[206]

B. The Arbitrariness of the Evidence-Based Justifications for the Direct Connection Doctrines

There is no question that direct connection doctrines implicate the defendant's right to present a defense. The question then becomes whether a non-arbitrary justification exists for the direct connection doctrines.

1. GENERAL EVIDENCE POLICIES

Holmes, in essence, justifies direct connection rules as a coalesced or specialized application of FRE 403–type rules. But *Holmes* does not consider the arguments made above in connection with FRE 403: third-party guilt evidence goes to the central issue in the case, so excluding it does not help the jury focus on "the central issues." A further problem with *Holmes*'s reasoning is that it forgets that the fundamental FRE 403

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203. *Id.* at 327.

204. *Id.*

205. *Id.* at 330.

206. *See, e.g.*, *Krider v. Conover*, 497 F. App'x 818, 822 (10th Cir. 2012) ("The Kansas rule is consistent with the Supreme Court's description of proper third-party evidence rules in *Holmes* . . . ."); *Shields v. Norris*, No. 5:04CV00344 JLH, 2007 WL 2154175, at *10 (E.D. Ark. July 24, 2007) (*Holmes* stated "that rules regarding evidence of third-party guilt are "'widely accepted'" (quoting *Holmes*, 547 U.S. at 327)); *State v. Wilson*, 864 N.W.2d 52, 64 (Wis. 2015) (*Holmes* approvingly cited Wisconsin's prior direct connection precedent, *State v. Denny*, 357 N.W.2d 12 (Wis. Ct. App. 1984)).

balance strongly favors admissibility: evidence is excluded only if the probative value is substantially outweighed by 403 dangers.

Holmes implicitly misstates the problem in two ways. First, it understates probative value as though it consisted only of the strength of the logical connection to the issue of perpetrator identity. But probative value also consists of the party's *need* for the evidence. Given the jury's natural demand for complete narratives, there is virtually always a significant need for some evidence of an alternative perpetrator.[207] So on the probative value side of the balance, even weak third-party guilt evidence usually has more than negligible probative value—making it unsuited to a presumption of exclusion under a coalesced 403 balance.

Second, *Holmes* implicitly overstates the danger side of the balance. The risk of jury confusion is typically extremely low to non-existent given that third-party guilt evidence is always relevant to the central issue of disputed perpetrator identity even where the evidence is not strongly probative of third-party guilt. But low 403 dangers do not substantially outweigh even low probative values.[208] The *Holmes* Court did not consider the other 403 dangers, but as we discussed above, these are not likely to be sufficiently high in most cases to justify a general rule targeting third-party guilt.

Moreover, the *Holmes* Court entirely overlooks the fact that 403-type rules are intended to be ad hoc, not systematic. To coalesce a 403 balance into a systematic rule should require some kind of showing that the rule is generally justified. For example, in *Rock v. Arkansas*,[209] cited with approval in *Holmes,* the Court struck down a state evidence rule categorically prohibiting hypnotically refreshed testimony because "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the

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207. *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172, 189 (1997) ("A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. [Jurors] who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters. . . . [A]n assurance that the missing link is really there is never more than second best."); Blume et al., *supra* note 7, at 1090 (explaining that jurors will hold missing information against defendants who are unable to offer evidence about "one or more major components of the story" (citations omitted)).

208. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 119 (3d ed. 2012) ("Where probative value is equally balanced against [a ground of exclusion] the evidence is to be admitted."); *see* WRIGHT & GRAHAM, *supra* note 102, § 5221 ("Though cases sometimes suggest that trial judges can exclude for low probative value alone, we think this risky because in the absence of a yardstick to measure probative value, the judge can only estimate."); Newell H. Blakely, *Article IV: Relevancy and Its Limits*, 30 HOUS. L. REV. 281, 317 (1993).

209. 483 U.S. 44 (1987).

State repudiating the validity of all post-hypnosis recollections."[210] The mere fact that most jurisdictions have adopted direct connection doctrines should not qualify as "clear evidence" showing the presumptive 403 balance of third-party guilt evidence. It may well be a shared error. Most jurisdictions also barred testimony by interested parties at some point prior to the adoption of modern evidence codes and have since seen the error in that.

2. A POLICY AGAINST FABRICATED EVIDENCE?

The *Holmes* Court did not suggest that direct connection doctrines could be legitimately justified as serving a policy against fabricated testimony. In *Washington v. Texas*,[211] the Court struck down a state statute barring one un-acquitted accomplice from testifying in defense of another accomplice. The Court found the rule arbitrary: since the rule allowed the accomplice to testify if he or she had been acquitted or was called by the prosecution, it could not "even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury."[212] One might try to invert this quote into a rule that defense evidence *could* be excluded on a showing that a group of persons is particularly likely to commit perjury. But that is doubtful.

To begin with, such a showing runs counter to the evidence rules in general, which abolish party-competency exclusions and give juries control over credibility questions. It arguably violates due process and a defendant's right to trial by jury to identify any group as presumptively excludible because its members are particularly likely to lie. Third-party guilt restrictions do this if they categorize defense witnesses as particularly likely to fabricate third-party guilt evidence. Such a rule should at least require "clear evidence" of an empirical nature in its support.[213]

Disfavoring third-party guilt evidence on grounds of fabrication risk also assumes that witnesses *are more likely to lie about third-party guilt* than about other relevant matters, such as the defendant's whereabouts in an alibi defense, the defendant's good character, and a host of other things. But as *Washington v. Texas* makes clear, it is not appropriate to focus on defense witnesses. A fabrication-risk justification would have to show that defense witnesses are more likely to lie about third-party guilt than prosecution witnesses are to lie about "first party guilt"—i.e., the defendant's guilt. This seems utterly

210. *Id.* at 61, *quoted in Holmes v. South Carolina*, 547 U.S. 319, 326 (2006).
211. 388 U.S. 14 (1967).
212. *Id.* at 22–23, *quoted in Holmes*, 547 U.S. at 325.
213. *See Rock v. Arkansas*, 483 U.S. 44, 61 (1987).

implausible. Moreover, a belief that defense witnesses have a greater tendency to lie than prosecution witnesses is irreconcilable with our system of trial by jury and confrontation of adverse witnesses. It is juries and cross-examination, and not presumptions regarding parties or claims, by which our trials develop inferences about which witnesses—if any—are untruthful.

Finally, as noted above, the direct connection doctrines are not rationally structured to address fabricated evidence. The rules invariably exclude what they deem to be "weaker" evidence. That's why *Holmes* focused on a "weak logical connection to the central issues."[214] But there is no reason to believe that facially weaker evidence is more likely to be fabricated than facially stronger evidence—that big lies are harder to tell than small ones. If preventing fabrication risk is the goal, the rules are irrational.

For these reasons, we fail to see how a policy against admitting fabricated testimony can possibly justify the infringement on the constitutional right to present a defense that is entailed in a restrictive rule against third-party guilt evidence.

3. GENERALIZED AND EXAGGERATED 403-TYPE DANGERS

Holmes tells us that evidence rules intruding on a defendant's right to present a defense must not be either "'arbitrary' or 'disproportionate' to the purposes they are designed to serve."[215] While *Holmes* reaffirms that 403-type balancing rules are "unquestionably constitutional" in general,[216] courts in fact do engage in such "arbitrary and disproportionate" rulemaking when they justify their direct connection doctrine by exaggerating 403 dangers.

A clear example of this arises out of Wisconsin, which justifies its direct connection test by claiming that "evidence that simply affords a possible ground of suspicion against another person should not be admissible. Otherwise, a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased."[217] Hundreds of other persons? Perhaps in such an extraordinary case, FRE 403 unfair prejudice might be found insofar as a prosecutor might have to rebut too many low-probability

214. *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006).

215. *Id.* at 324 (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)).

216. *Id.* at 327 (quoting *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion)).

217. *State v. Denny*, 357 N.W.2d 12, 17 (Wis. Ct. App. 1984); *accord People v. Mendez*, 223 P.2d 65, 70–71 (Cal. 1924).

suspects.[218] But it is completely disproportionate to exclude evidence of one other person's motive to commit the crime in order to safeguard against the "conceivable" (really?) prospect of that unicorn of a case in which a defendant offers "hundreds" of alternative suspects. For every one such case—if there ever is one—there will be dozens or hundreds of others offering evidence directed to one other person and perhaps a much smaller number of cases suggesting a small number of alternate suspects.

Wisconsin is not alone in this exaggerated policy rationale.[219] Clearly, a case-by-case 403 rule can take care of the "hundreds of suspects" case, and a direct connection doctrine is extremely disproportionate to control that evil.

C. Protection of Third-Party Reputational Rights

As noted above, a further policy ground to support the direct connection doctrines is to protect the reputational interests of third parties. Evidence suggesting that a specific person may have committed the crime could spill outside the courtroom to cause adverse consequences to that person's reputation and life in the community. Without meaning to trivialize such consequences, however, the possibility of reputational harm falls far short of justifying the direct connection doctrines.

We begin by noting that very few courts ever mention the protection of third parties or their reputations as a justification for any of the direct connection doctrines. This suggests the weakness of the rationale.

Various policies counsel against according such third-party interests enough weight to overcome a criminal defendant's right to present a defense. The criminal defendant's strong liberty interests and constitutional right to compulsory process and to present a complete defense already strike a balance in favor of the defendant, even at the expense of various third-party interests. That third-party witnesses can be exposed to great inconvenience, stress, embarrassment in open

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218. Or perhaps not. How difficult would it be for a prosecutor to brush aside, in closing argument, a sweeping claim that hundreds of others had a low-level, undifferentiated dislike of the victim?

219. *See State v. Rabellizsa*, 903 P.2d 43, 47 (Haw. 1995) ("Evidence that a third person had a motive to commit the crime, absent any evidence that links the third person to the commission of the crime, is irrelevant and collateral in nature."); *State v. Gazerro*, 420 A.2d 816, 825 (R.I. 1980) ("Admission of [third-party guilt evidence] would have been an impermissible invitation to the jury to speculate on a collateral matter.").

court, or worse does not diminish the defendant's right to confront them.

The law demonstrates the superiority of compulsory process and confrontation rights over reputational rights in a variety of ways. The litigation privilege immunizes court filings and testimony from defamation claims. Witnesses may be impeached with their prior bad acts and character for dishonesty.[220] Such impeachment may be introduced against persons whose hearsay statements are used in evidence, even if they don't appear in court as witnesses.[221] And evidence codes provide virtually no grounds for a court to limit evidence in order to protect reputational rights, especially of non-witnesses. In the Federal Rules, only FRE 611 offers limited protection of "*witnesses* from harassment or undue embarrassment."[222] Nothing in the rules purports to extend such protection to non-witnesses, and, more significantly, even FRE 611 is not intended to permit exclusion of relevant evidence; the rule merely governs "the *mode of . . . examining* witnesses."[223]

The discretionary rule for excluding relevant evidence is, of course, FRE 403 and its state-law analogues, and it is quite clear that "unfair prejudice" under that rule does not extend to third-party reputations. As the Advisory Committee says, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis."[224] Thus, "[u]nfair prejudice" refers to the jury's adjudicative process as it affects the parties and is not an open-ended invitation for judges to exclude evidence due to the innumerable externalities that might flow from the trial process.

Nor do the direct connection doctrines address the problem of third-party reputational harm with the degree of logical fit we would expect when a criminal defendant's fundamental rights are at stake. As we have seen in an analogous context, direct connection doctrines are designed to exclude third-party guilt evidence deemed weaker and admit such evidence when it is stronger; yet the strength of the evidence will be positively correlated to the reputational harm. In other words, the evidence more damaging to third-party reputations is more likely to be admitted; while the weaker evidence, less damaging to third party reputations, is more likely to be excluded. Finally, a criminal suspect arguably has a right to an investigatory process the integrity of which promotes accuracy—certainly there is a societal interest in such

220. *See* FED. R. EVID. 608, 609.
221. *See* FED. R. EVID. 806.
222. *See* FED. R. EVID. 611(a)(3) (emphasis added).
223. FED. R. EVID. 611 (emphasis added).
224. FED. R. EVID. 403 advisory committee's note.

processes. But setting a high bar to suspicion of alternative suspects promotes the sort of "tunnel vision" that can undermine accurate factfinding at the investigatory stage and contribute to false convictions.[225] Third-party reputational interests must be balanced against the public interest in investigating alternate suspects and either clearing them or duly considering them.

In sum, under *Holmes*, the disfavored treatment of third-party guilt evidence is a disproportionate, and at times arbitrary, response to the question of third-party interests.

D. The Arbitrariness of Process-Based Justifications for the Direct Connection Doctrines

We have thus far discussed justifications for the direct connection doctrines that fail the *Holmes* test because they are illogical or disproportionate to achieving their stated purposes. Two additional justifications for the direct connection doctrines are that they are simply a foundation rule and that they help to prevent "speculative acquittals."[226] These rationales fail *Holmes*'s test because they are based on illegitimate purposes and are, thus, "arbitrary." As demonstrated above, direct connection doctrines function not as foundation rules but as sufficiency tests. As we argue, these are unconstitutional because they undermine the placement of the burden of proof on the prosecution. The purported "policy against speculative acquittals" is nothing less than an assault on the reasonable doubt standard and is also unconstitutional.

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225. *See* Findley & Scott, *supra* note 5, at 362. *Cf.* Imwinkelreid, *supra* note 4, at 128–29 (arguing that liberal admission of defense attacks on flawed investigative processes will promote better investigative practices).

226. *See United States v. McVeigh*, 153 F.3d 1166, 1191 (10th Cir. 1998) ("In the course of weighing probative value and adverse dangers, courts must be sensitive to the special problems presented by 'alternative perpetrator' evidence . . . It is not sufficient for a defendant merely to offer up unsupported speculation that another person may have done the crime. Such speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice."), *disapproved of by Hooks v. Ward on other grounds*, 184 F.3d 1206, 1126–27 (10th Cir. 1999); *Winfield v. United States*, 676 A.2d 1, 5 (D.C. Cir. 1996) (reaffirming the jurisdiction's direct connection doctrine because the standard "insures the exclusion of evidence that 'is too remote in time and place, completely unrelated or irrelevant to the offense charged, or too speculative with respect to the third party's guilt.'" (citations omitted)); *see also* McCord, *supra* note 4, at 976 ("[T]he high sufficiency standard [of direct connection doctrines] should prevent convictions based on speculative evidence."); *id.* at 977 (equating "erroneous" and "speculative" acquittals).

1. THE UNCONSTITUTIONALITY OF IMPOSING A SUFFICIENCY TEST ON DEFENSE EVIDENCE

The Constitution guarantees the defendant the right to have each element of each charge against her proven beyond a reasonable doubt. As the Supreme Court stated in *In re Winship*,[227] "it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required."[228] In *Victor v. Nebraska*,[229] the Court confirmed that "[t]he beyond a reasonable doubt standard is a requirement of due process."[230] Under this due process requirement, the government "must prove every ingredient of an offense beyond a reasonable doubt, and . . . it may not shift the burden of proof to the defendant"[231] on any "fact necessary to constitute the crime with which [the defendant] is charged."[232] So while the Supreme Court has deemed it constitutional for the defendant to bear a burden of persuasion on "separate issue[s]," such as whether the defendant killed under "extreme emotional disturbance," the defendant can never be required to "negative any facts of the crime which the State is to prove in order to convict of murder."[233] As a result, in contested-identity cases, the Constitution requires that the prosecution prove that the defendant—and not somebody else—committed the act in question. Conversely, the defendant cannot be required to prove a third party's guilt to some defined threshold of probability.

Two corollaries follow inexorably from the prosecution's burden of proof. First, the defendant is not required to present any evidence. In both the civil and criminal contexts, the party with the burden of proof must present evidence sufficient to meet its burden of persuasion in its case-in-chief or else be subject to dismissal. As a matter of logic and convention, the jury is entitled to disbelieve the prosecution's evidence or to determine that the weight of the prosecution's evidence falls short of its persuasion burden—even if the defense does not offer a single witness or pose a single cross-examination question to a prosecution witness. Juries across the country in state and federal courts are thus instructed: defendants need not present any evidence.[234] This right to

227. 397 U.S. 358 (1970).

228. *Id.* at 362–63 (listing numerous SCOTUS opinions).

229. 511 U.S. 1 (1994).

230. *Id.* at 5.

231. *Patterson v. New York*, 432 U.S. 197, 215 (1977).

232. *Winship*, 397 U.S. at 364.

233. *Patterson*, 432 U.S. at 206–07.

234. *See, e.g.*, 1A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICES AND INSTRUCTIONS 223 (6th ed. 2008) (The prosecution's burden of proof and the presumption of innocence "mean[] that the defendant has no obligation to present any

present no evidence is also reflected in the principle that the prosecution is not entitled to judgment as a matter of law, under any circumstances, on any element of the crimes charged.[235]

The second corollary, which follows from all of this, is that a court cannot subject any of the defendant's evidence to a sufficiency test, at least when that evidence is relevant to the prosecution's case-in-chief. A sufficiency test places a burden of production on the offering party. It sets a threshold on which some type of finding can be made and asks whether the cumulative weight of offered evidence could, in the mind of a reasonable trier of fact, meet that threshold. It is clear that a court could not constitutionally exclude a defendant's evidence on the ground that it is insufficient to raise a reasonable doubt. That sufficiency test is flatly contradicted by the entire framework of the burden of proof, discussed above. How, then, is it permissible for a court to exclude relevant defense evidence that fails to meet some lower threshold, such as that the evidence "directly connects" a third party to the crime? The only conceivable basis for such an exclusion is foundation. But, as we have seen, foundation is merely a sufficient evidentiary showing to make the evidence relevant, not to make the evidence sufficient to prove a point.[236] Again, foundation would be a showing that the third party had a motive to commit the crime—thereby increasing the marginal probability of third-party guilt—and not a showing that the motive evidence "directly connects" the third party to the crime.

2. A SUPPOSED POLICY AGAINST "SPECULATIVE ACQUITTALS"

A prominent advocate of the direct connection doctrines justifies them as advancing a purported "policy against speculative

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evidence at all, or to prove to you in any way that he is innocent."); FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.7 (1997) ("To overcome the defendant's presumption of innocence, the State has the burden of proving the crime with which the defendant is charged was committed and the defendant is the person who committed the crime. The defendant is not required to present evidence or prove anything.").

235. *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408 (1947) ("[A] judge may not direct a verdict of guilty no matter how conclusive the evidence."); *Sparf v. United States*, 156 U.S. 51, 105–06 (1895) ("[I]t is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged, or of any criminal offense less than that charged.").

236. Indeed, one eminent scholar has argued that, under *Winship*, even a defendant's foundation showings should be subject to a standard less than a preponderance. *See* Imwinkelried, *supra* note 162, at 884–88.

acquittals."[237] Yet no court or commentator has, to our knowledge, explained this hazy notion by telling us what a "non-speculative acquittal" is. Simply substituting equally vague synonyms—an acquittal "not based on conjecture"—doesn't do the job. If what is meant is that acquittals must be based on "some evidence," then that violates the principle that the burden of proof is entirely on the prosecution and the defendant need not produce any evidence.

Once we bring to mind this fundamental principle that the defendant need not produce evidence, the so-called "policy against speculative acquittals" appears self-contradictory. If a defendant must produce "some evidence" to support reasonable doubt, then it is hard to see how that policy is served by a rule excluding what evidence the defense tries to produce. If a defendant may be acquitted based on reasonable doubt stemming from shortcomings in the prosecution's case alone, without affirmative defense evidence, there must be some explanation of the idea of "speculation" that distinguishes it from "reasonable doubt."

This would be hard to do because "doubt" is by nature a form of speculation. Conviction of a crime beyond a reasonable doubt means a relatively high degree of certainty that the defendant is the perpetrator. In a disputed-perpetrator-identity case, a jury can have a reasonable doubt without hearing any defense evidence at all. To have a reasonable doubt in such a case means to entertain the possibility that someone else did the crime. Since there is (by hypothesis) no evidence that any particular third party committed the crime, that possibility is necessarily speculative.

The exclusion of third-party guilt evidence under the direct connection doctrine is not justifiable as a directed verdict for the prosecution. No one claims it is, nor could they: to direct a verdict of guilt would violate the right to jury trial.[238] To say that a court can exclude all evidence of third-party guilt, while allowing a jury to make a finding of not guilty—which necessarily implies that some unknown third person committed the crime—means that a jury can make a decision based on a possibility of third-party guilt with no evidence of third-party guilt. The danger of "speculative acquittals" arising from third-party guilt evidence implies that it is *more* speculative to entertain the possibility of third-party guilt with *some* evidence than with *no* evidence. Absurd!

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237. *See, e.g.*, McCord, *supra* note 4, at 976–77; *see also United States v. Jordan*, 485 F.3d 1214, 1219 (10th Cir. 2007) (decrying "speculative blaming" of third party suspects).

238. *See supra* note 235 and accompanying text.

The term "speculation" is used in various ways in evidence law cases and analysis, not necessarily consistently or clearly. Perhaps at the core of the definition of speculation is a mental process of inferring case-specific facts without sufficient case-specific evidence, relying instead on more-or-less plausible generalizations about human behavior or conditions of the social or physical world. In some contexts, it is well justified to bar speculation juries.

But we don't see how criminal verdicts can be one of them. If a jury can acquit based on doubts about the prosecution's case, it can do so without any affirmative, case-specific, doubt-raising evidence since the defendant need not present any. If a conviction cannot be based on a mere preponderance of the evidence, then a defendant who is "probably guilty" can be acquitted because he is not "very probably guilty" or whatever "beyond a reasonable doubt" means. In the disputed-perpetrator-identity case, this means that a jury may acquit based on a belief that some third party (known or unknown) may have, *but probably did not, commit the crime*. How is that not "speculation"?

This point may be more easily illustrated with the numerical values sometimes used to describe the burdens of proof. (We don't necessarily endorse these numerical values as entirely theoretically coherent, but use them simply for illustrative purposes.) If proof by a preponderance of the evidence is a value just over 50% probable and proof beyond a reasonable doubt is a 90% probability, there is a range covering 40% of the probability space between those two points in which a jury may base its acquittal decision on "mere" suspicions or possibilities ranging between 10% and 50% probable.

We have discussed above the various errors in subjecting defense evidence to a sufficiency test. First, imposing a sufficiency test is an erroneous application of the principle of foundation to an offered item of relevant evidence. Second, imposing a sufficiency test improperly imposes a burden of production on the defendant. Even if framed as a low one, it is an error of constitutional dimension to assert that a defendant cannot produce any evidence unless it meets some sufficiency threshold, no matter how modestly stated—e.g., "more than a mere suspicion." Third, even if sufficiency tests could be imposed, courts err in how they apply them. Invariably, courts view the third-party guilt evidence in isolation, rather than considering its sufficiency in light of other reasonable doubt evidence in the case—impeachment of prosecution witnesses, for example. And some courts may impose a third-party guilt sufficiency standard that is *higher* than reasonable

doubt.[239] Arguably, all full-bore direct connection sufficiency tests impose a threshold of proof higher than reasonable doubt.

Viewed this way, the direct connection doctrines are irreconcilable with the twin fundamental principles that the defendant need not produce any evidence and that the prosecution must prove guilt beyond a reasonable doubt. This problem is even worse when we ask why direct connection restrictions are limited to affirmative evidence of third-party guilt evidence. Where the defendant disputes his identity as the perpetrator, *all* evidence offered by a defendant is essentially third-party guilt evidence. It is a suggestion that someone other than the defendant did it. This is essentially true of every question attempting to contradict or otherwise impeach the credibility of a prosecution witness. If third-party guilt evidence must rise to some "direct connection" threshold, what is the principled stopping point that allows the defendant to impeach any prosecution witnesses, to suggest that they may have gotten the facts wrong, or to impeach them for bias or a character trait for dishonesty? The answer is that there is no principled distinction: if existing direct connection rules are constitutionally permissible, so are rules prohibiting defendants from presenting any weak evidence, down to the last impeachment question, if the totality of their evidence is insufficient to raise more than a "mere suspicion" of innocence. In that case, there is no constitutional objection to directing a verdict for the prosecution.

Of course, the Constitution does bar all of these things.[240] The direct connection doctrines interfere with the entire constellation of core defense rights: to confront adverse witnesses, to be acquitted based on reasonable doubt, to defend without presenting any affirmative evidence (and conversely to place the entire burden of proof on the prosecution), and to have a jury decide guilt or innocence. Reasonable doubt acquittals are speculative in theory and by definition. There is no policy against "speculative acquittals."

CONCLUSION: A SIMPLE REFORM

We have shown that the direct connection doctrines have no justification within the law of evidence for their disfavored treatment of third-party guilt evidence, or even for identifying such evidence as a special category. We have also shown that the doctrines' disfavored treatment of defense evidence is arbitrary under *Holmes v. South Carolina*: the direct connection doctrines are not sufficiently logically

239. *See, e.g.*, *Snyder v. State*, 893 So. 2d 488, 535 (Ala. Crim. App. 2003) (third-party guilt evidence "must exclude the accused as a perpetrator of the offense").

240. *See supra* text accompanying notes 227–235.

connected, or proportionate to, any legitimate interest and, therefore, violate a defendant's constitutional right to present a defense.

We have no "reform proposal" or newly minted doctrinal test to fix this problem. That's because the general law of evidence already provides the solution. Our reform is simply to abolish the direct connection doctrines entirely. Third-party guilt evidence should be treated, properly, as no different from any other type of relevant evidence. There should be no special sufficiency tests imposed on it and no improper systematic balancing tests under the guise of FRE 403–type rules. As we have argued, the problem with any reform proposal specially targeted to third-party guilt evidence is that the very treatment of such evidence as a special class contributes to the problem: it reinforces the idea held by courts and prosecutors that third-party guilt evidence warrants special scrutiny. It doesn't: third-party guilt evidence should be treated no differently from any other relevant evidence. The only special scrutiny warranted here is scrutiny of judicial evidence rulings to make sure that courts don't disfavor third-party guilt evidence under the guise of applying general evidence rules.

APPENDIX

This Appendix includes the case from each jurisdiction that, in our opinion, best represents its take on the third-party guilt question. Many of these cases quote or cite earlier cases from the same jurisdiction or other jurisdictions. Internal quotation marks and citations have generally been omitted to avoid clutter, as have parentheticals indicating these omissions and any underlying sources cited or quoted.

Direct Connection States

Alabama – *Snyder v. State*, 893 So. 2d 488, 537 (Ala. Crim. App. 2003) ("In order for evidence to be admissible under *Ex parte Griffin*, the party offering the evidence must show (1) that the evidence relates to the res gestae of the crime; (2) that the evidence excludes the accused as a perpetrator of the offense; and (3) that the evidence would have been admissible if the third party had been on trial.").

Alaska – *Rogers v. State*, 280 P.3d 582, 586 (Alaska Ct. App. 2012) ("[E]vidence of the third party's guilt is admissible only if the defense can produce evidence that tends to directly connect such other person with the actual commission of the crime charged.").

Arkansas – *Armstrong v. State*, 284 S.W.3d 1, 5 (Ark. 2008) ("The rule we have applied simply requires that the evidence a defendant wishes to admit to prove third-party guilt sufficiently connects the other person to the crime.").

California – *People v. Hall*, 718 P.2d 99, 104 (Cal. 1986) ("[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.").

Connecticut – *State v. Wright*, 89 A.3d 458, 464 (Conn. App. Ct. 2014) ("The defendant must . . . present evidence that directly connects a third party to the crime.").

Florida – *King v. State*, 89 So. 3d 209, 224 (Fla. 2012) ("Before evidence of the guilt of another may be deemed relevant and thereby admissible, the evidence must clearly link that other person to the commission of the crime.").

Georgia – *Mutazz v. State*, 722 S.E.2d 47, 49 (Ga. 2012) (Third party culpability evidence "must directly connect the other person with the corpus delicti, or show that the other person has recently committed a crime of the same or similar nature.").

Hawaii – *State v. Rabellizsa*, 903 P.2d 43, 46 (Haw. 1995) ("[A]s long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible.").

Illinois – *People v. Galvan*, 614 N.E.2d 391, 396 (Ill. App. Ct. 1993) (Third-party guilt evidence "is relevant and admissible only when a close connection can be demonstrated between the evidence offered and the commission of the offense; remote conduct of a person not connected with the crime may not be shown."). *But see People v. Ross*, 2015 IL App (1st) 123136-U, 2015 WL 1442085, ¶ 82 (Ill. App. Ct. Mar. 30, 2015) (unpublished opinion) ("We agree with the defendant that our supreme court's precedent does not require the defendant to show a particularly 'close' connection to the alternate suspect in order to admit such evidence. Rather, the test for admissibility is relevance . . . .").

Iowa – *State v. Campbell*, 714 N.W.2d 622, 630 (Iowa 2006) ("[E]vidence offered by a defendant tending to incriminate another must be confined to substantive facts and create more than a mere suspicion that such other person committed the offense.").

Kansas – *State v. Burnett*, 329 P.3d 1169, 1180 (Kan. 2014) ("[W]hile evidence of the motive of a third party to commit the crime, standing alone, is not relevant, such evidence may be relevant if there is other evidence connecting the third party to the crime.").

Maine – *State v. Mitchell*, 4 A.3d 478, 485–86 (Me. 2010) ("In short, whether to admit alternative suspect evidence of any variety depends on both the admissibility of the information contained in the offer of proof and the probative value of the proffered evidence in establishing a reasonable connection between the alternative suspect and the crime.").

Massachusetts – *Commonwealth v. Wood*, 14 N.E.3d 140, 151 (Mass. 2014) ("A judge's discretion to admit third-party culprit evidence is not without limits. The proffered evidence must have a rational tendency to prove the issue the defense raises, and the evidence cannot be too remote or speculative. Further, if the evidence is hearsay not falling within any exception, it is admissible only if it is otherwise relevant, will not tend to prejudice or confuse the jury, and there are other substantial connecting links to the crime.").

Michigan – *People v. Hill*, 766 N.W.2d 17, 22 (Mich. Ct. App. 2009) ("[E]vidence tending to inculpate another . . . may be excluded where it does not sufficiently connect the other person to the crime."), *aff'd in part, vacated in part*, 773 N.W.2d 257 (Mich. 2009).

Minnesota – *State v. Hokanson*, 821 N.W.2d 340, 350–51 (Minn. 2012) ("[T]he defendant must lay a proper foundation for admission of such evidence by offering evidence that has an inherent tendency to connect the alternative perpetrator to the commission of the charged crime.").

Missouri – *State v. Nash*, 339 S.W.3d 500, 513 (Mo. 2011) ("[E]vidence that another person had an opportunity or motive for

committing the crime . . . must tend to prove that the other person committed some act directly connecting him with the crime.").

Nevada – *White v. State*, 285 P. 503, 509–10 (Nev. 1930) ("[T]he proferred evidence must . . . directly connect[] the other with the corpus delicti.").

New Hampshire – *State v. Durgin*, 82 A.3d 902, 907 (N.H. 2013) (referring specifically to reverse 404(b) evidence: "Because the defendant did not establish the requisite nexus between the Yorks' prior bad acts and the assault on Lapierre, we conclude that the trial court did not unsustainably exercise its discretion when it ruled that the evidence was irrelevant and, therefore, inadmissible.").

New Jersey – *State v. Salas-Vizciano*, No. A-4176-11T3, 2014 WL 2178540, at *3 (N.J. Super. Ct. App. Div. May 27, 2014) (Third-party guilt evidence must have "a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case.").

New Mexico – *Case v. Hatch*, 731 F.3d 1015, 1041 (10th Cir.) *cert. denied*, 134 S. Ct. 269 (2013) (discussing New Mexico law: "[E]vidence that another person had a motive to commit the crime for which a defendant is on trial is generally inadmissible, absent direct or circumstantial evidence linking the third person to the crime.").

North Carolina – *State v. Watts*, 584 S.E.2d 740, 745 (N.C. 2003) ("[A]dmission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt.").

Ohio – *State v. Walker*, No. 2005-CR-1118, 2006 WL 3423379, at *6 (Ohio Ct. App. Nov. 27, 2006) ("[W]hen a defendant wishes to implicate a specific individual, evidence of the third party's guilt is admissible only if the defense can produce evidence that tends to directly connect such other person with the actual commission of the crime charged . . . There is no requirement that the proffered evidence must prove or even raise a strong probability that someone other than the defendant committed the offense. Rather, the evidence need only tend to create a reasonable doubt that the defendant committed the offense.").

Oklahoma – *Gore v. State*, 119 P.3d 1268, 1275–76 (Okla. Crim. App. 2005) ("[B]efore evidence tending to show that another party might have committed the crime would be admissible, the evidence offered must connect such other person with the fact; that is, some overt act on the part of another towards the commission of the crime itself.").

Rhode Island – *State v. Covington*, 69 A.3d 855, 865 (R.I. 2013) ("The offer of proof must contain (1) evidence of another person's

motive to commit the crime with which a defendant is charged in conjunction with other evidence tending to show (2) the third person's opportunity to commit the crime and (3) a proximate connection between that person and the actual commission of the crime.").

South Carolina – *State v. Cope*, 684 S.E.2d 177, 186–87 (S.C. Ct. App. 2009) ("[B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party."), *aff'd*, 748 S.E.2d 194 (S.C. 2013).

Texas – *Ford v. State*, 444 S.W.3d 171, 200 (Tex. App. 2014), ("When a defendant seeks to introduce evidence of an alternate perpetrator, he must establish a sufficient nexus between that person and the crime."), *petition for cert. filed*, *Ford v. Texas*, No. 15-8574 (U.S. Mar. 16, 2016).

Vermont – *State v. Cameron*, 721 A.2d 493, 499 (Vt. 1998) ("Evidence tending to show that a third party committed a crime should be admitted if motive and opportunity are shown and there is also evidence to directly connect the third party to the offense charged.").

Virginia – *Johnson v. Commonwealth*, 529 S.E.2d 769, 784 (Va. 2000) ("Proffered evidence that merely suggests a third party may have committed the crime charged is inadmissible; only when the proffered evidence tends clearly to point to some other person as the guilty party will such proof be admitted.").

Washington – *State v. Franklin*, 325 P.3d 159, 163 (Wash. 2014) ("[M]ere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.").

West Virginia – *State v. Parr*, 534 S.E.2d 23, 29 (W. Va. 2000) ("In a criminal case, the admissibility of testimony implicating another person as having committed a crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative.").

Wisconsin – *State v. Denny*, 357 N.W.2d 12, 17 (Wis. Ct. App. 1984) ("[A]s long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible.").

FRE 403 States

Arizona – *State v. Gibson*, 44 P.3d 1001, 1003 (Ariz. 2002) ("The appeal before us presents the opportunity to clarify the manner of determining admissibility of evidence of third-party culpability. The

appropriate analysis is found in Rules 401, 402, and 403, Arizona Rules of Evidence.").

Colorado – *People v. Elmarr*, 351 P.3d 431, 439 (Colo. 2015) ("[A]lternate suspect evidence must be sufficiently probative to be admissible; that is, it must be both relevant (under CRE 401) and its probative value must not be sufficiently outweighed by the danger of confusion of the issues or misleading the jury, or by considerations of undue delay (under CRE 403).").

Delaware – *Watkins v. State*, 23 A.3d 151, 155 (Del. 2011) (applying relevance and 403 balancing).

Idaho – *State v. Meister*, 220 P.3d 1055, 1059 (Idaho 2009) ("This Court is presented with the inquiry of whether alternate perpetrator evidence is subjected to a different standard for admission than all other evidence . . . This Court finds that [the] Larsen [direct connection rule] was implicitly overruled when the Idaho Rules of Evidence were adopted in 1985.").

Indiana – *Joyner v. State*, 678 N.E.2d 386, 389 (Ind. 1997) ("Evidence which tends to show that someone else committed the crime logically makes it less probable that the defendant committed the crime, and thus meets the definition of relevance in Rule 401.").

Kentucky – *Smith v. Commonwealth*, No. 2010-SC-000757-MR, 2012 WL 4222211, at *5 (Ky. Sept. 20, 2012) ("[Alternate perpetrator] evidence must pass the balancing test under KRE 403 to be admissible.").

Louisiana – *State v. Gibbs*, 728 So. 2d 945, 950 (La. Ct. App. 1999) (applying relevance).

Maryland – *Allen v. State*, 103 A.3d 700, 712 (Md. 2014) ("[T]he admissibility of reverse other crimes evidence, i.e., evidence that someone other than the defendant committed other crimes or bad acts, is governed by Md. Rule 5–403.").

Mississippi – *Ervin v. State*, 136 So. 3d 1053, 1059 (Miss. 2014) (applying relevance).

New York – *People v. Primo*, 753 N.E.2d 164, 168 (N.Y. 2001) ("The better approach, we hold, is to review the admissibility of third-party culpability evidence under the general balancing analysis that governs the admissibility of all evidence.").

Oregon – *State v. Holterman*, 687 P.2d 1097, 1101 (Or. Ct. App. 1984) (applying 403 balancing).

South Dakota – *State v. Bruce*, 796 N.W.2d 397, 403 (S.D. 2011) ("There is no rule flatly prohibiting third-party perpetrator evidence in South Dakota. Rather, if the proffered evidence is relevant but challenged as unfairly prejudicial, confusing or misleading, we require trial courts to balance the probative value of the evidence against the possible prejudicial effect.").

Tennessee – *State v. Tucker*, No. E2013-02727-CCA-R3CD, 2014 WL 4415376, at *9 (Tenn. Crim. App. Sept. 9, 2014) ("A defendant is entitled to present evidence implicating another in the crime only if the evidence is relevant under Tennessee Rule of Evidence 401 and the evidence is not unfairly prejudicial as provided by Rule 403.").

Wyoming – *Mraz v. State*, 326 P.3d 931, 934 n.2 (Wyo. 2014) ("Evidence that someone else may have committed the crime charged is perfectly admissible as long as it is relevant, not unfairly prejudicial, not hearsay and satisfies the other rules of evidence.").

Direct Connection Federal Circuits

First Circuit – *United States v. Patrick*, 248 F.3d 11, 21 (1st Cir. 2001) (requiring "a connection between the other perpetrator and the crime, and not mere speculation").

Second Circuit – *United States v. White*, 692 F.3d 235, 245–46 (2d Cir. 2012) (stating third-party guilt evidence "may be excluded where it does not sufficiently connect the other person to the crime").

FRE 403 Federal Circuits

Third Circuit – *United States v. Stevens*, 935 F.2d 1380, 1404–05 (3d Cir. 1991) ("[T]he admissibility of 'reverse 404(b)' evidence depends on a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues.").

Fourth Circuit – *United States v. Lighty*, 616 F.3d 321, 358 (4th Cir. 2010) ("Alternative perpetrator cases thus balance two evidentiary values: the admission of relevant evidence probative of defendant's guilt or innocence under Rule 401 with the exclusion of prejudicial, misleading, and confusing evidence under Rule 403.").

Fifth Circuit – *United States v. Settle*, 267 F. App'x 395, 398 (5th Cir. 2008) ("Evidence of third-party guilt is admissible if the evidence by itself or along with other evidence demonstrates a nexus between the third party and the crime charged. This nexus, however, cannot be speculative because speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice.").

Sixth Circuit – *United States v. West*, 534 F. App'x 280, 283–84 (6th Cir. 2013) (assessing admissibility of third-party guilt evidence under FRE 401 and FRE 403).

Seventh Circuit – *United States v. Woolsey*, 535 F.3d 540, 549 (7th Cir. 2008) (assessing admissibility of third-party guilt evidence under FRE 401 and FRE 403).

Eighth Circuit – *United States v. Thibeaux*, 784 F.3d 1221, 1226 (8th Cir. 2015) (excluding third-party guilt evidence for creating a "mini-trial regarding a collateral matter" and for being cumulative).

Tenth Circuit – *United States v. Jordan*, 485 F.3d 1214, 1219 (10th Cir. 2007) ("It is not sufficient for a defendant merely to offer up unsupported speculation that another person may have done the crime. Such speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice.").

Eleventh Circuit – *United States v. Johnson*, 904 F. Supp. 1303, 1307 (M.D. Ala. 1995) ("Evidence that a person other than the defendant committed the crime would certainly be admissible if it was exculpatory and if it complied with the requirements of Rules 401 and 403.").