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The Immoral Application of Exclusionary Rules

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In both civil and criminal cases today, judges routinely withhold relevant evidence from jurors, fearing that jurors would use it in an irrational or legally impermissible manner. Forcing jurors to take responsibility for a verdict based upon a government-screened pool of evidence stands in sharp contrast to the way we ordinarily think about government efforts to withhold potentially useful information from citizens faced with important decisions. The First Amendment’s guarantee of the freedom of speech, for example, reflects a moral judgment that the government offends its citizens’ deliberative autonomy when it restricts speech based upon fears about what that speech might cause citizens to believe or about how that speech might cause citizens to behave. Drawing upon the work of Immanuel Kant, First Amendment theorists, medical ethicists, and others, this Article contends that a court infringes upon jurors’ autonomy in a morally problematic way when it refuses to admit relevant, readily available evidence. The Article argues that this infringement is especially troubling because jury service is a vital component of the American system of self-government, a domain in which citizens’ autonomy interests are particularly strong. The Article focuses on three commonly applied exclusionary rules: the rule barring the admission of relevant evidence believed to pose a risk of unfair prejudice, the rule barring the admission of relevant hearsay, and the rule barring the admission of relevant character evidence when offered to prove how a person behaved on a particular occasion. The Article contends that, while there are occasions when applying these rules is morally permissible, the existing rules sweep far too broadly, infringing upon jurors’ autonomy in ways that cannot be morally justified.
INTRODUCTION

"Where is the consistency between this utter distrust of juries, and the implicit faith bestowed, with so much affectation, on the decisions they are permitted to give on such evidence as they are permitted to receive?"  

For those who have been taught to revere the jury’s central place in our justice system, it comes as a surprise to learn that, in the eyes of the law, jurors’ rational capacities often approach those of “a group of low-grade morons.” As Mirjan Damaška has observed, “[o]ne would expect a legal process that glorifies novice amateurs as fact finders to presume their intellectual and emotional capacity for the job.” Like lawmakers in most Continental systems, for example, we could have constructed an evidentiary regime that places only the narrowest of restrictions on the kinds of relevant evidence that factfinders are permitted to see and hear. Instead, American judges carefully screen the evidence to which jurors are exposed, frequently withholding relevant information based upon fears that jurors would use it in an irrational or legally impermissible manner. Judges routinely exclude evidence presented in the form of hearsay, evidence of people’s character traits, and evidence thought to pose a

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1 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 15-16 (1827).
2 EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 105 (1956); see also Mark A. Frankel, A Trial Judge’s Perspective on Providing Tools for Rational Jury Decisionmaking, 85 NW. U. L. REV. 221, 223 (1990) (“[I]t is highly ironic that our legal system vests such a large degree of confidence in and deference to the jury’s final decision, yet has so little confidence in the ability of jurors to arrive at this sacrosanct result by impartial, nonadversarial, and thoughtful means.”).
4 See id. at 16 (“One scans the legal map of Europe in vain for analogues to common law provisions that prohibit character evidence, evidence of collateral misdeeds, or similar information about a person’s past life.”); id. at 17 (“Absent from mainstream Continental thought is the concern that propensity information, although probative, could be accorded more weight than it deserves or that it could generate unfair bias against a litigant.”); Alex Stein, The Refoundation of Evidence Law, 9 CAN. J.L. & JURISPRUDENCE 279, 280 (1996) (“In most European legal systems, admission, examination, and evaluation of evidence are governed solely by common sense, logic, and general experience.”).
5 See 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 88c, at 632 (Peter Tillers rev. 1983) (“Our system of admissibility is based on the purpose of saving the jurors from being misled by certain kinds of evidence. Their inexperience in analyzing evidence and their unfamiliarity with the chicanery of counsel distinguish them from the judge in this respect.”); Stephen Landsman, Of Mushrooms and Nullifiers: Rules of Evidence and the American Jury, 21 ST. LOUIS U. PUB. L. REV. 65, 66 (2002) (“[T]he bulk of America’s elaborate evidentiary code is today maintained and defended as a means of ‘protecting’ lay jurors from evidence that, in one way or another, is claimed to pose a threat to appropriate jury decision-making.”).
6 See FED. R. EVID. 802 (declaring the general rule that hearsay is inadmissible).
7 See id. 404 (banning, with limited exceptions, the admission of character evidence aimed at proving how a person behaved on a particular occasion).
substantial risk of unfair prejudice, for example, notwithstanding the fact that the evidence is relevant and could help a rational person reach an accurate verdict. As Learned Hand wrote when criticizing the frequent exclusion of hearsay, we “surround [jurors] with restrictions which if they have any rational validity whatever, depend upon distrust.”

Our lack of trust in jurors manifests itself in other ways, as well. Jeffrey Abramson points out that judges sometimes “treat jurors as children, refusing to let them take notes during trial or to have written copies of the legal instructions they are supposed to follow.” Similarly, although most American jurisdictions grant their courts the discretionary power to allow jurors to pose questions to witnesses—a practice that many commentators heartily endorse—it is a power that judges rarely exercise. As

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8 See id. 403 (permitting the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”).

9 See Jerome Frank, Courts on Trial: Myth and Reality in America 123 (1949) (stating that the hearsay rule and other exclusionary rules “limit, absurdly, the court-room quest for the truth,” with the result that the factfinder is often given “a gravely false picture of the actual facts”); Franklin Strier, Reconstructing Justice: An Agenda for Trial Reform 121 (1994) (“Myriad exclusionary rules can keep highly probative evidence from the jurors.”).

10 Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, in Lectures on Legal Topics, 1921-1922, at 89, 101 (1926).

11 Jeffrey Abramson, We, the Jury 5 (1994); accord William W. Schwarzer & Alan Hirsch, The Modern American Jury: Reflections on Veneration and Distrust, in Verdict: Assessing the Civil Jury System 399, 399 (Robert E. Litan ed., 1993) [hereinafter Verdict] (stating that juror distrust “is evident in the practice of prohibiting them from taking notes, asking questions, and discussing the case amongst themselves during trial, and the tendency to keep them in the dark about much of what goes on during the trial”). Although most American jurisdictions give judges the discretion to permit note-taking by jurors, many judges forbid it and others discourage it. See Stephen J. Adler, The Jury: Trial and Error in the American Courtroom 239 (1994) (noting one study indicating that thirty-seven percent of the nation’s judges forbid note-taking by jurors, and stating that many other judges informally attempt to discourage it). Many commentators argue that jurors should be given much broader note-taking powers. See, e.g., id. at 235-38 (endorsing the practice); Larry Heuer & Steven Penrod, Juror Notetaking and Question Asking During Trials: A National Field Experiment, 18 Law & Hum. Behav. 121, 143-49 (1994) (reporting numerous empirical findings that support the practice).

12 See Kara Lundy, Note, Juror Questioning of Witnesses: Questioning the United States Criminal Justice System, 85 Minn. L. Rev. 2007, 2021 (2001) (“Each United States Court of Appeals has found that juror questioning is soundly within the discretion of the trial judge. A majority of state courts follow the federal courts and hold that trial judges may permit juror questions.”).

13 See, e.g., Adler, supra note 11, at 235-38 (arguing that allowing jurors to ask witnesses questions enables jurors to clarify important points of confusion); Strier, supra note 9, at 118-19 (arguing that it allows jurors to clear up confusion and provides important information to the judge and the attorneys about how jurors are thinking); Frankel, supra note 2, at 222-25 (arguing that it “enhances the rational aspects of the jury’s fact-finding role”); Heuer & Penrod, supra note 11, at 143-49 (reporting numerous empirical findings that support the practice); Alayna Jehle & Monica K. Miller, Controversy in the Courtroom: Implications of Allowing Jurors to Question Witnesses, 32 WM. MITCHELL L. REV. 27, 56-57 (2005) (arguing that it reduces juror stress and increases juror confidence and satisfaction); J. Clark Kelso, Final Report of the Blue Ribbon Commission on Jury System Improvement, 47 Hastings L.J. 1433, 1501 (1996) (recommending that the practice be widely adopted in California); Nicole L. Mott, The Current
one member of the Idaho bench explained, judges worry that if jurors are allowed to ask witnesses questions, they will “become adversaries of one of the parties and shed their impartial role,” they will get angry if their questions draw objections from the attorneys, and they will begin considering the evidence while witnesses are still on the stand, “rather than waiting until the close of the trial to begin the deliberation process.” In most cases, therefore, jurors are forced to sit mutely in the jury box, knowing that they ultimately will be asked to reach a verdict based upon a body of evidence that they played no role in developing and that contains less than all of the available relevant information.

Asking jurors to take responsibility for a verdict based upon a limited, government-screened pool of evidence stands in sharp contrast to the way we ordinarily think about government efforts to withhold potentially useful information from citizens faced with important decisions. The First Amendment provides the most obvious point of comparison. To a significant degree, the constitutional guarantee of the freedom of speech is grounded in the conviction that individuals generally need unrestricted access to relevant information if they are to make “informed and intelligent” choices. Even more fundamentally, the First Amendment reflects a moral judgment that the government offends its citizens’ deliberative autonomy when it restricts speech based upon fears about what that speech might cause citizens to believe or about how that speech might cause citizens to behave. As Ronald Dworkin explains, the First Amendment demands that government treat all its adult members, except those who are incompetent, as responsible moral agents. . . . Government insults

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14 See Adler, supra note 11, at 236 (stating that “most judges surveyed never allow question asking by jurors”).

15 N. Randy Smith, Why I Do Not Let Jurors Ask Questions in Trials, 40 Idaho L. Rev. 553, 563-64 (2004); accord Lundy, supra note 12, at 2030 (“Juror questioning prevents jurors from being impartial because impartiality depends upon passivity.”).

16 Cf. Shari Seidman Diamond, What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in Verdict, supra note 11, at 282, 299 (“Although the jury is asked to make the ultimate decision, jurors themselves are often treated as passive and compliant subjects who need only absorb the evidence and law presented in the courtroom and produce a verdict.”).

17 See U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”).

18 Frederick Schauer, Free Speech: A Philosophical Enquiry 69 (1982).

19 See C. Edwin Baker, Human Liberty and Freedom of Speech 56 (1989) (“[O]utlawing acts of the speaker in order to protect people from harms that result because the listener adopts certain perceptions or attitudes disrespects the responsibility and freedom of the listener.”). See generally Susan J. Brison, The Autonomy Defense of Free Speech, 108 Ethics 312, 312-13 (1998) (“The autonomy defense of free speech is arguably the one most commonly used by liberal legal and political theorists, and it appears to be gaining in popularity.”).
its citizens, and denies their moral responsibility, when it decrees
that they cannot be trusted to hear opinions that might persuade
them to dangerous or offensive convictions. We retain our dignity,
as individuals, only by insisting that no one—no official and no
majority—has the right to withhold an opinion from us on the
ground that we are not fit to hear and consider it.20

Of course, even in the First Amendment setting, the moral imperative of honoring
citizens’ deliberative autonomy must sometimes give way to competing values. The
government is not morally obliged to stand idly by, for example, while someone
deliberately provokes a riot with an inflammatory speech.21 The United States Supreme
Court declared in Brandenburg v. Ohio that the government may restrict speech that “is
directed to inciting or producing imminent lawless action and is likely to incite or
produce such action.”22 Similarly, if jurors possess a moral right to see and hear all of the
relevant, readily available evidence in a case—as I shall argue that they do—that moral
right undoubtedly is not absolute.23 Unlike many of their decisions in daily life, the
decisions that jurors make inside the courtroom are of greatest significance to individuals
other than the jurors themselves—it is the lives, liberties, and fortunes of the litigants,
and not of the jurors, that are directly at stake. Just as it is morally permissible for the
government to proscribe speech that creates an unacceptably high risk of imminent harm
to others, therefore, the government presumably may also screen jurors from relevant
evidence that would create an unacceptably high risk of harm to litigants, in the form of
verdicts that are based upon irrational judgments or upon reasons that the law condemns.

The most remarkable fact about jurors’ moral claim to a complete body of
relevant evidence is not that it may sometimes be outweighed by other concerns; rather, it
is that courts and commentators have not even contemplated the possibility that such a
moral claim might exist. In their debates about the various factors that weigh for or
against admitting particular kinds of evidence, courts and scholars have said nothing
about the possibility that honoring jurors’ deliberative autonomy is an important moral

20 RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION
21 I describe a moral framework for reaching this conclusion infra at notes 162-68.
23 Gerald Dworkin wisely warns autonomy’s advocates not to assume that autonomy always
outweighs conflicting values:

There is an intellectual error that threatens to arise whenever autonomy has been
defended as crucial or fundamental: This is that the notion is elevated to a higher status
than it deserves. . . . I believe that autonomy is both important normatively and
fundamentally. Neither of these precludes the possibility that other concepts
are both important and fundamental.

Senses of Autonomy, 46 STAN. L. REV. 875, 879 (1994) (arguing that, although autonomy is important in
the First Amendment setting, autonomy-based arguments “seldom yield categorical prescriptions for
disputed issues”).
value that must be included in the balance. Instead, the debates have focused almost entirely on whether the rules of admissibility are appropriately calibrated to “the alleged cognitive, rational, and deliberative failings of juries.”24 While vigorously defending citizens’ autonomy-based right to exchange ideas and information without government interference in other settings—thereby ensuring that government interference remains the rare exception, rather than the rule—the legal profession regards withholding relevant evidence from jurors as morally unobjectionable. One can hardly be surprised, therefore, that exclusionary rules remain utterly commonplace.

In this article, I question the moral legitimacy of key exclusionary rules that courts apply today. I focus on rules that are based primarily upon juror distrust. There are other exclusionary rules that courts often apply, based either in whole or in part on social objectives that are unrelated to doubts about jurors’ rational capacities. We exclude evidence of alleged rape victims’ sexual histories, for example, in order to encourage them to testify against their assailants;25 we exclude evidence of remedial measures taken after an accident has occurred, in order to encourage safety improvements in the goods and services that are offered to the public;26 and we exclude evidence relating to plea negotiations in criminal cases and settlement negotiations in civil cases, in order to encourage litigants to resolve their differences without costly and time-consuming trials.27 All of these rules must be evaluated through the lens of juror autonomy to ensure that we do not infringe upon jurors’ moral rights without adequate justification. I shall focus here, however, on three commonly applied exclusionary rules that are based squarely on doubts about jurors’ competence: the rule barring the admission of evidence believed to pose a high risk of unfair prejudice,28 the rule barring the admission of hearsay,29 and the rule barring the admission of character evidence when offered to prove how a person behaved on a particular occasion.30

In Part I, I describe the historical forces to which modern-day exclusionary rules owe their birth. For many centuries, jurors were either entirely or partially self-informing, relying just as readily on information personally obtained outside the

24 Frederick Schauer, On the Supposed Jury-Dependence of Evidence Law, 155 U. PA. L. REV. 165, 175 (2006); see also id. at 185-98 (arguing that judges are susceptible to many of the same kinds of cognitive weaknesses as jurors, that many of the existing exclusionary rules provide a reasonable response to those weaknesses, and that the rules of evidence thus should apply with roughly equal force in bench and jury trials); DAMAŠKA, supra note 3, at 28 (“[T]he oldest and most widely accepted justification for distinctive Anglo-American evidence rules is the need to compensate for the intellectual and emotional frailties of amateurs cast in the role of occasional judges.”).

25 See FED. R. EVID. 412 (providing protection for alleged victims of sexual misconduct).

26 See id. 407 (providing protection for those who take “subsequent remedial measures”).

27 See id. 408 (concerning settlement negotiations in civil cases); id. 410 (concerning plea negotiations in criminal cases).

28 See id. 403 (prescribing a balancing test in which evidence’s probative value is weighed against the risk of unfair prejudice).

29 See id. 802 (stating the general rule banning hearsay).

30 See id. 404 (stating the general rule concerning the admission of character evidence).
courtroom as on information presented within it. Judges, moreover, talked uninhibitedly with jurors throughout the course of a trial, frequently advising them to resolve factual disputes in one manner rather than another. Judges and lawmakers showed little interest in screening the evidence that jurors could see and hear until the mid-eighteenth century, when trial lawyers emerged as a dominant courtroom force and judges ceased giving jurors explicit advice concerning the verdicts they should render. Neither lawyers nor judges were content to leave jurors entirely to their own devices. As the legal profession searched for ways to place parameters on jurors’ evidentiary assessments, exclusionary rules emerged as a central part of the answer.

In Part II.A, drawing from Immanuel Kant’s practical imperative, I establish my argument’s chief premise: as rational beings, all competent adults have an autonomy-based moral right not to be used merely as a means to others’ ends. I then assert that there are two ways in which the United States’ jury system infringes upon jurors’ autonomy. First, citizens whom the government compels to serve on juries are forced to use their rational capacities entirely in service to the litigants’ and the government’s objectives. Second, we give jurors the heavy responsibility of rendering accurate verdicts, but we withhold relevant, readily available information that rational jurors would want to consider before reaching their conclusions.

In Part II.B, as a means of further laying the groundwork for my arguments concerning exclusionary rules, I briefly describe ways in which compulsory jury service can probably be morally justified. I point out that the Court has likened jury duty to compulsory enrollment in the military and has concluded that both are duties that citizens owe to society in exchange for the benefits they receive from the justice and national-defense systems. I also find moral significance in the fact that compelling citizens to serve on juries does not itself entail concealment or deception, moral evils that frequently are present when a person is immorally used merely as a means to others’ ends.

In Part II.C, I question the moral viability of exclusionary rules that courts routinely apply in both civil and criminal cases. My argument regarding these rules proceeds in three parts. First, I contend that we infringe upon jurors’ autonomy in a morally problematic way when we refuse to allow them to see and hear readily available information that might rationally bear upon their verdict. Second, I argue that this infringement is especially troubling because it occurs within the context of jury service, a vital component of the American system of self-government. Autonomy interests have long been deemed especially weighty in domains that relate directly to sovereign citizens’ efforts to govern themselves. Finally, I examine the three most commonly invoked exclusionary rules that are based upon fears of juror irrationality: the rule barring the admission of relevant evidence that poses a substantial risk of unfair prejudice, the rule barring the admission of relevant hearsay, and the rule barring the admission of relevant character evidence when offered to prove how a person behaved on a particular occasion. I argue that, while there are occasions when applying these rules is morally permissible, the existing rules cast an unreasonably large net, infringing upon jurors’ autonomy in ways that cannot be morally justified.
I. THE RISE OF EXCLUSIONARY RULES AND JUROR MISTRUST

A. The Powers of the Medieval Jury

Although scholars cannot identify the precise point at which lay jurors arrived on the scene,\(^{31}\) it is clear that, by the thirteenth century, jury trials were commonplace in both civil and criminal cases in England.\(^{32}\) In several significant respects, however, medieval jurors exercised powers that differ markedly from those that jurors exercise today. Unlike the ideal modern juror, who comes to court ignorant of the facts giving rise to the case at hand, the ideal medieval juror already possessed a great deal of information about the events underlying the dispute.\(^{33}\) Indeed, it was fully expected in medieval England that “[e]very juror could and should have private communications [with eyewitnesses and with one another] and bring personal knowledge to bear on their verdict.”\(^{34}\)

By coming to court armed with much of the information necessary to decide the cases they were assigned, lay jurors enabled the Crown to enforce its laws over a wide geographical area without having to hire an army of evidence gatherers.\(^{35}\)

To increase the odds that the jurors compelled to serve in a particular case either would bring relevant knowledge with them or would easily be able to obtain such knowledge if they lacked it, courts were required to draw a specified number of jurors from the locale where the disputed events occurred.\(^{36}\)

John Langbein writes:

“The hope was that a jury of the locality would contain witness-like persons who would know the facts, or if not, that these jurors would be well positioned to investigate the facts on their own. The early jury was self-informing. No instructional trial was held to inform its verdict. . . . The medieval jury came to court not to listen

\(^{31}\) See Stephen Landsman, The History and Objectives of the Civil Jury System, in VERDICT, supra note 11, at 22, 25 (noting that some scholars trace civil juries to the Norman invasion in 1066, while others trace civil juries to the invasion’s Anglo-Saxon antecedents).

\(^{32}\) See THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 3 (1985) (“From about 1220, trial by jury has been the primary means for determining guilt or innocence in prosecutions for felony.”); Landsman, supra note 31, at 25 (tracing civil juries to a time prior to the thirteenth century).

\(^{33}\) See GREEN, supra note 32, at 108 (“[T]he medieval juror was presumed to know something of the events underlying the cases it heard.”); Stephen C. Yeazell, The New Jury and the Ancient Jury Conflict, 1990 U. CHI. LEGAL F. 87, 91 (“The jurors were to be selected for their knowledge of the underlying events; if they were ignorant, the solution was not to present evidence, but to select more jurors until one found those who knew.”).


\(^{35}\) See Yeazell, supra note 33, at 89 (“By giving factfinding duties to unsupervised laymen, the medieval jury system brilliantly solved a chronic medieval problem: how to administer without enough administrators.”).

\(^{36}\) See Seipp, supra note 34, at 78-79 (describing these requirements).
but to speak, not to hear evidence but to deliver a verdict formulated in advance.37

As Professor Langbein suggests, actual trials frequently were deemed unnecessary, or were held only briefly to give jurors an opportunity to review relevant documents.38 When witnesses did testify, it often was because the jury had determined that the testimony would be useful; and once those witnesses had been summoned, jurors participated actively in the questioning.39 That questioning, moreover, was far more informal than the courtroom interrogations to which we are accustomed today. Jurors often questioned witnesses in private, outside the presence of the parties and court officials.40

Because jurors were given so much latitude to gather the evidence they required, and because they obtained much of that evidence either before trial or outside the presence of the presiding judge, jurors ordinarily were able to resolve disputes in whatever manner they deemed just.41 If jurors believed that a royal directive was

38 See Seipp, supra note 34, at 81 (explaining that the presentation of documents, rather than live testimony, was often “the essence of the trial”).
39 See J.R. Pole, “A Quest of Thoughts”: Representation and Moral Agency in the Early Anglo-American Jury, in The Dearest Birth Right, supra note 34, at 101, 105 (stating that “throughout the eighteenth century,” jurors were permitted to “summon and question witnesses on their own initiative”); John H. Langbein, The Criminal Trial Before the Lawyers, 45 U. CHI. L. REV. 263, 288 (1978) (stating that, as late as the early eighteenth century, jurors were permitted to request that particular individuals be called as witnesses, and then were permitted to interrogate them).
40 See Seipp, supra note 34, at 82 (“As late as the 1570s, jurors during their deliberations could send for anyone who had been sworn to testify in the case, and question them in private. The information supplied by sworn witnesses was not something that the justices and parties needed to see in open court.”).
41 See Yeazell, supra note 33, at 91 (“Left in control of the facts, the medieval jury could ‘find’ those facts in ways that reshaped or challenged the formal legal regime.”). The controversial power of jury nullification later served as a “subversive vehicle through which the [American] colonists could prevent royal decrees from being carried out.” Adler, supra note 11, at 4; accord Landsman, supra note 31, at 35 (stating that “[t]his was precisely for this reason that the British authorities increasingly sought either to control or to avoid jury adjudications”). American jurors’ ability to decide disputed points of law and to apply the law in the manner they deemed most just was generally blessed by the courts until the late nineteenth century. Jeffrey Abramson writes:

The [American] jury entered the nineteenth century as a body authorized to resolve contested points of law on its own, even to refuse enforcement of laws considered unjust. The jury exited the century duty-bound to follow judicial instructions and to enforce the law whether it agreed with it or not.

Abramson, supra note 11, at 37; see also Frank, supra note 9, at 112 (stating that, in the early nineteenth century, judges told juries that they were “not bound to accept the judge’s instructions concerning the rules”); Paul D. Carrington, The Seventh Amendment: Some Bicentennial Reflections, 1990 U. CHI. LEGAL F. 33, 44 (“For much of the century following ratification of the [Seventh] Amendment, federal civil juries were told that they were responsible for deciding law as well as fact, giving such attention as they might choose to the judge’s instructions on the law.”). Jury nullification in America lost its judicial sanction in
unreasonably harsh, for example, they could acquit a person charged with violating it. Although jurors’ periodic refusal to enforce the kingdom’s laws frustrated the Crown’s desires, jurors’ deliberative freedom usefully served as a mediating force between the Crown and its subjects: by refusing to enforce laws that they deemed unreasonable, and by publicly legitimizing those laws that they did enforce, juries helped to insulate the Crown from popular resistance that it might otherwise have had to confront.42

Serving in this mediating capacity did not come without personal costs. Because jurors were known to be able to render the verdicts they believed were appropriate, those who were unhappy with the outcome of a case did not have difficulty deciding whom to blame.43 When the Crown’s judges grew impatient with jurors’ refusal to enforce particular laws, they showed an increasing willingness to place uncooperative jurors in prison.44 Conversely, when jurors did enforce unpopular laws, they bore the brunt of the public’s anger: they often were the targets of threats and assaults, for example, and depictions of jurors in popular culture manifested “a remarkable hostility.”45 As the medieval era came to a close, therefore, “[j]urors had good reason to want to shift the responsibility for deciding guilt, liability and entitlement” to someone else.46

B. The Transition to the Modern Era

In some respects, jurors in the sixteenth, seventeenth, and early eighteenth centuries continued to wield great power. They still helped to determine who would be called as witnesses, for example, and they continued to participate in the interrogation of those witnesses who were called.47 Their ability to blunt the enforcement of unjust laws, moreover, was given a significant boost by Chief Justice John Vaughan’s 1670 ruling in Bushell’s Case.48 In his landmark opinion, Chief Justice Vaughan declared that a judge

1895. See Sparf & Hansen v. United States, 156 U.S. 51, 102 (1895) (“We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence.”).

42 See GREEN, supra note 32, at 105 (describing the medieval jury’s mediating influence).

43 See Yeazell, supra note 33, at 90 (“Using a jury . . . shifted to a local institution the unpleasant task of delivering bad news to one of the parties to the lawsuit. The loser’s neighbors, not the judge, caused his unhappiness.”).

44 See GREEN, supra note 32, at 140-43 (discussing this practice).

45 Seipp, supra note 34, at 89-90.

46 Id. at 90.

47 See Langbein, supra note 39, at 288 (stating that, in court records from the late seventeenth and early eighteenth centuries, one frequently sees “a juror asking questions of the witnesses or the accused, or asking for certain witnesses to be called, or making observations about the facts or about particular testimony or about the character of witnesses and accused”); Pole, supra note 39, at 105 (“[T]hroughout the eighteenth century, jurors could summon and question witnesses on their own initiative.”).

could not punish jurors for rendering a verdict that, in the judge’s estimation, was at odds with the evidence.\footnote{See \textit{id.} at 1010 (“For if the Judge, from the evidence, shall by his own judgment first resolve upon any tryal what the fact is . . . and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue tryals by them at all?”); see also Landsman, supra note 31, at 32 (“From the era of the Glorious Revolution to the time of Wilkes’s struggles, the jury was the very essence of liberty, a fundamentally democratic institution that served as a check on the tyrannical and oppressive power of government.”).}

In other respects, however, this was a period of significant change. Although \textit{Bushell’s Case} stripped the government of the most heavy-handed means of manipulating jurors, other jury-restraining forces gradually emerged. By at least the early eighteenth century, judges were instructing jurors not to rely upon personally acquired knowledge when reconstructing the events underlying a dispute.\footnote{It is not clear precisely when such instructions become commonplace. Compare ABRAMSON, supra note 11, at 21 (“[T]he jury that was given protection by the Bill of Rights was the local jury; knowing about a case and about the community asked to judge it qualified rather than disqualified a person for jury duty.”), and JAMES B. THAYER, \textit{A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW} 134-36 (1898) (discussing Lord Coke’s belief in the seventeenth century that jurors still were permitted to rely on their own personal knowledge when reaching their verdicts), and Pole, supra note 39, at 106 (stating that, in the late seventeenth century, courts still relied in part on “the medieval fact-finding role of jurors, who were expected to be self-informing and to make their own enquiries”), and Seipp, supra note 34, at 85 (stating that, although live testimony became more common in the sixteenth century, courts still assumed in the late seventeenth century that “[j]urors could be deciding on the basis of information about which the justices were completely unaware”), with GREEN, supra note 32, at 287 (“[B]y the eighteenth century, if not earlier, it may have been deemed inappropriate for jurors to take [personal] knowledge into account.”), and Langbein, supra note 39, at 299 n.105 (arguing that, by the mid-seventeenth century, courts condemned jurors’ use of personally acquired knowledge when reaching their verdicts), and Yeazell, supra note 33, at 93 (“In the latter seventeenth and eighteenth centuries, legal rules . . . made the self-informing jury not just rare but illegal.”).} Just as significantly, judges exerted a tremendous influence in the trials over which they presided, not merely by helping to interrogate witnesses, but also by conversing with jurors, urging them to consider particular lines of argument or ways of evaluating the evidence, telling jurors how they should vote, and asking jurors to continue to deliberate if they initially favored verdicts with which the judges disagreed.\footnote{See \textit{CHRISTOPHER ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND} 3 (1997) (stating that a typical eighteenth-century judge in a criminal case frequently questioned witnesses and “could talk informally with jurors during the course of the trial; he could advise them on the verdict that should be returned, discuss the grounds of the verdict with them after it had been given, and, if need be, require them to deliberate further”); DAMAŠKA, supra note 3, at 51 (stating that, until the late eighteenth century, judges dominated the factfinding process, making their preferences clearly known to juries and asking juries to continue their deliberations if they returned with verdicts that the judges did not like).} Jurors, moreover, usually followed the judges’ advice—a fact that is hardly surprising, when one considers their incentives to find others with whom to share responsibility for their verdicts.\footnote{See \textit{supra} notes 43-46 and accompanying text (describing jurors’ frequent unpopularity).} After examining records of criminal cases from the late seventeenth and early eighteenth centuries, Professor Langbein writes that judges “did not regard the jury as an autonomous fact-
finder. The jury alone rendered the verdict, but the judge had no hesitation about telling
the jury how it ought to decide. We find the jury routinely following the judge’s lead in
these cases.”

Because judges’ contacts with jurors were so pervasive, judges saw little need to
screen the evidence that jurors viewed and heard. If judges were worried that jurors
would misunderstand or be misdirected by particular items of evidence, they could
simply tell jurors what they believed the evidence did or did not establish. As a result,
exclusionary rules were almost entirely unknown to the English courts during this period;
hearsay, character evidence, and evidence of prior convictions, for example, were
routinely admitted.

C. The Arrival of Exclusionary Rules

In the latter half of the eighteenth century, trial lawyers emerged as a dominant
force. Lay representatives had been allowed to appear on civil litigants’ behalf for
many centuries. But it was not until 1729 that Parliament paved the way for the modern
professionalization of trial lawyers by specifying minimal qualifications and detailed

53 Langbein, supra note 39, at 285; see also Green, supra note 32, at 270-71 (stating that jurors
usually voted in the manner advised by the presiding judge); Langbein, supra note 37, at 1181 (stating that
the records of Sir Dudley Ryder, who served as chief justice of King’s Bench in the mid-eighteenth
century, reveal that “Ryder exercised astonishing powers of judicial comment and instruction”).

54 See Allen, supra note 51, at 3 (“This close contact between judge and jury meant that there
was little need for the judge to become concerned with formal directions designed to protect the defendant,
or to worry about the quality of the evidence admitted.”); Langbein, supra note 39, at 301 (“Throughout
[this] period the judges showed scant disposition to filter evidence from the jury.”); id. at 306 (stating that,
in the seventeenth and early eighteenth centuries, “judges did not need anything as clumsy as the rules of
admissibility to keep juries to heel”).

55 See Green, supra note 32, at 119 (“The shift from a trial dominated by the self-informing jury
to a trial based mainly on evidence produced by the prosecution . . . gave greater opportunity for judicial
instruction . . . .”); id. at 270-71 (explaining that juries’ factual findings between the sixteenth and
eighteenth centuries were shaped by judicial advice, rather than by rules of evidence).

56 See Langbein, supra note 39, at 301 (stating that hearsay was frequently admitted and there was
“a vast reliance on past conviction evidence”); id. at 305 (stating that character evidence was heavily used).

57 See id. at 263 (“Whereas much of our trial procedure has medieval antecedents, prosecution and
defense counsel cannot be called regular until the second half of the eighteenth century.”); Gordon Van
Kessel, Adversary Excesses in the American Criminal Trial, 67 Notre Dame L. Rev. 403, 426 (1992)
(stating that “lawyers displaced judges as the dominant force at trial” in the late 1700s).

58 See Paul A. Brand, The Origins of the English Legal Profession, 5 Law & Hist. Rev. 31, 31-35
(1987) (discussing instances in which lay people with no specialized training helped litigants in the twelfth
century); id. at 35 (stating that, by approximately 1300, litigants could sometimes secure the assistance of
individuals who had specialized knowledge and skills and who were governed by at least minimal rules of
conduct); Jonathan Rose, The Legal Profession in Medieval England: A History of Regulation, 48
Syracuse L. Rev. 1, 6-16 (1998) (describing the growth of lay representation in English courts in the
thirteenth century).
rules of conduct,59 and it was not until the 1730s that attorneys began frequently leading felony prosecutions and that individuals charged with felonies began frequently securing professional representation.60 As attorneys became the central players in courtroom proceedings, judges’ role sharply diminished—no longer did they talk with jurors about the evidence and try explicitly to influence their decisions.61 Lacking confidence in lay jurors’ raw adjudicative capacities, judges and attorneys alike looked for new ways to ensure that jurors would not roam too far afield when evaluating exhibits and witnesses’ testimony. The result was the birth of modern evidence law, “[t]he essential attribute of [which] is the effort to exclude probative but problematic oral testimony, such as hearsay, for fear of the jurors’ inability to evaluate the information properly.”62

The first exclusionary rules to arrive were primarily rules of competency.63 These rules declared that certain categories of individuals—such as those who were parties to the case, those who had been convicted of a felony, and those who did not believe in a lie-avenging deity—were ineligible to testify because they were likely to try to deceive


60 See J.M. Beattie, Crime and the Courts in England, 1660-1800, at 278 (1986) (“Prosecution and defense counsel were active at the Old Bailey and the provincial assizes by the 1720s and 1730s . . . .”); Langbein, supra note 39, at 307 (relying on historical materials “to date to the 1730s the breakdown of the rule forbidding counsel to the accused”); id. at 308 (noting the “curious” fact that, prior to the 1730s, individuals charged with misdemeanors had been allowed to secure representation); id. at 311-12 (noting the increasing frequency of attorney-led felony prosecutions in the 1730s); cf. Faretta v. California, 422 U.S. 806, 825 (1975) (“The ban on counsel in felony cases, which had been substantially eroded in the courts, was finally eliminated by statute in 1836.”); Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. REV. 911, 919 n.19 (2006) (stating that “public prosecutors and defense counsel appear not to have become the norm in America until the nineteenth century”).

61 Professor Langbein writes:

It was certainly not foreseen that the lawyers could alter the dynamic of the jury trial in the most fundamental way, that they could break up the ancient working relationship of judge and jury and cost the judge his mastery of the proceedings. In the Old Bailey at the end of our period in the mid-1730s there was still hardly a sign that adversary procedure and the law of evidence lay just ahead.

Langbein, supra note 39, at 314.

62 Langbein, supra note 37, at 1172; see also id. (“[T]he central event in the formation of modern evidence law was the rapid development of adversary criminal procedure in the last quarter of the eighteenth century, an event which thereafter came to influence the conduct of civil trials as well.”); ALLEN, supra note 51, at 3 (“[B]ecause there was less opportunity for ad hoc guidance [from the judge], greater care had to be taken to exclude evidence that jurors might not be able to assess accurately.”).

63 See Langbein, supra note 37, at 1181 (stating that the earliest evidentiary objections, appearing in the mid-eighteenth century, concerned either documents or rules of competency).
the jury.64 Rules barring evidence of a party’s commission of other crimes followed closely behind.65 By the mid-nineteenth century, “[e]vidence of questionable reliability, which would have been heard for what it was worth a century earlier, was frequently excluded.”66

The proliferation of exclusionary rules did not escape criticism. “Evidence is the basis of justice,” Jeremy Bentham wrote in 1827.67 “[E]xclude evidence, you exclude justice.”68 If attorneys and lawmakers were concerned that certain kinds of relevant evidence might be unreliable, Bentham argued, the solution was not to deprive jurors of the evidence altogether, but rather to instruct jurors about the dangers that the evidence presented and then let them decide for themselves whether those fears were warranted in the case at hand.69 As in the passage that appears at the outset of this article,70 Bentham urged his contemporaries to think hard about the logic of declaring confidence in jurors’ verdicts while also withholding evidence based upon concerns regarding those same jurors’ rational capacities:

If there be one business that belongs to a jury more particularly than another, it is, one should think, the judging of the probability of evidence: if they are not fit to be trusted with this, not even with the benefit of the judge’s assistance and advice, what is it they are fit to be trusted with? Better trust them with nothing at all, and do without them altogether.71

Exclusionary rules, Bentham insisted, are nothing more than “insults offered by the author of each rule to the understanding of those whose hands are expected to be tied by it.”72 Bentham argued that relevant evidence should be excluded only when the risk of an inaccurate verdict in the evidence’s absence is outweighed by the “vexation”—

64 See ALLEN, supra note 51, at 1 (describing the competency rules that prevailed in the mid-eighteenth century); MCCORMICK ON EVIDENCE §§ 61-66 (John W. Strong ed., 5th ed. 1999) (discussing the early rules of competency).


66 ALLEN, supra note 51, at 1-2.

67 BENTHAM, supra note 1, at 1.

68 Id.

69 See id. at 12-15; WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 3 (1985) (stating that Bentham “advocated the abolition of all formal rules and a return to a ‘natural’ system of free proof, based on everyday experience and common-sense reasoning”); id. at 34-35 (stating that Bentham believed judges and lawmakers should give advice to jurors about how to weigh different kinds of evidence, rather than rely upon rigid rules of inadmissibility).

70 See supra note 1 and accompanying text.

71 BENTHAM, supra note 1, at 17.

72 Id. at 616.
principally in the form of resources expended—that would be incurred if the evidence were produced.\footnote{Id. at 192-93; see also Twining, supra note 69, at 42 (stating that Bentham believed “that no evidence should be excluded unless it is irrelevant or superfluous or its production would involve preponderant vexation, expense, or delay”). In his early-nineteenth-century treatise, Thomas Starkie took the contrary view, endorsing competency rules that spared jurors from evidence that was likely to mislead them. See 1 Thomas Starkie, A Practical Treatise on the Law of Evidence 14-22 (2d ed. 1833).}

Bentham’s arguments were not entirely unavailing. Most of the competency-based rules that existed in Bentham’s day have long since been abandoned, both in England and in the United States.\footnote{See Allen, supra note 51, at 14 (noting the abandonment of such rules in England); McCormick on Evidence, supra note 64, §§ 61-66 (discussing the abandonment of such rules in England and the United States); see also Fed. R. Evid. 601 (“Every person is competent to be a witness except as otherwise provided in these rules.”). The only witnesses declared incompetent to testify in federal court today are individuals who lack personal knowledge of the relevant facts, see Fed. R. Evid. 602; individuals who do not or cannot take a satisfactory oath to testify truthfully, see id. 603; judges who are presiding over the trials at issue, see id. 605; and jurors who are sitting in the trials at issue, see id. 606(a).}

England also has taken steps to abolish or limit other exclusionary rules, as well. After eliminating the right to a jury trial in most civil cases, for example, England eliminated many of the restrictions on the admissibility of hearsay.\footnote{See Laird C. Kirkpatrick, Evidence Law in the Next Millennium, 49 Hastings L.J. 363, 365 (1998) (noting these developments); Lucy S. McGough, Hearing and Believing Hearsay, 5 Psychol. Pub. Pol’y & L. 485, 495 (1999) (noting the decline of the hearsay rule in England in both civil and criminal cases).}

Other countries have followed the same pattern, reducing their reliance on juries and making corresponding cuts in their evidence codes.\footnote{See Schauer, supra note 24, at 173 (“When we look at the countries outside of the United States in which the jury is in decline, we see a commensurate decline . . . in the law of evidence as well.”); cf. Graham C. Lilly, The Decline of the American Jury, 72 U. Colo. L. Rev. 53, 59 (2001) (“America is now the only country in the world where the jury continues to play a broad and central role in the adjudicatory process.”).}

In the United States, however—where juries remain the subject of constitutional guarantees in both civil\footnote{See U.S. Const. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .”).} and criminal\footnote{See id. art. III, § 2, cl. 3 (“The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”; id. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”).} federal cases—far-reaching exclusionary rules remain fully in force, with rules barring hearsay, character evidence, and evidence deemed to pose a high risk of unfair prejudice serving as the leading examples.\footnote{See supra notes 6-8 and accompanying text (citing the relevant rules).}

The fact that exclusionary rules trace their roots to the assessments of trial lawyers and judges hardly guarantees that those rules are invulnerable to moral criticism.
Indeed, as I shall now argue, there are critical ways in which those rules are morally 
problematic. It is to the nature and scope of the moral problems that I now turn.

II. JUROR AUTONOMY AND ITS MORAL IMPLICATIONS

A. The Right Not to Be Treated Merely as a Means to Others’ Ends

Although perhaps best known for introducing the categorical imperative, Immanuel Kant’s 
groundbreaking *Foundations of the Metaphysics of Morals* advanced a 
companion argument that remains tremendously influential in its own right. 
Kant argued that “every rational being exists as an end in himself and not merely as a means to be 
arbitrarily used by this or that will.”81 Emphasizing each person’s intrinsic moral value, 
Kant proposed the “practical” imperative: “Act so that you treat humanity, whether in 
your own person or in that of another, always as an end and never as a means only.”82 
One should not make “a deceitful promise” to another person, for example, because 
doing so would constitute using that person “merely as a means” to achieve one’s own 
objects.83 At its core, the practical imperative is grounded in the autonomy of the 
 rational being, demanding that no person wholly instrumentalize another.84

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80 See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 44 (Lewis White Beck 
trans., Bobbs-Merrill Co. 1969) (1785) (“There is . . . only one categorical imperative. It is: Act only 
according to that maxim by which you can at the same time will that it should become a universal law.”). 
The book’s title is alternatively translated as *Groundwork of the Metaphysics of Morals*.

81 Id. at 52; see also id. at 53 (stating that rational “beings are not merely subjective ends whose 
existence as a result of our action has a worth for us”).

82 Id. at 54. Kant believed that the practical imperative constituted “the supreme limiting 
condition on freedom of the actions of each man.” Id. at 55. In his subsequently published *The 
Metaphysics of Morals*, Kant similarly wrote:

Every human being has a legitimate claim to respect from his fellow human beings and is 
in turn bound to respect every other. Humanity itself is a dignity; for a human being 
cannot be used merely as a means by any human being (either by others or even by 
himself) but must always be used at the same time as an end.

IMMANUEL KANT, THE METAPHYSICS OF MORALS 209 (Mary Gregor trans., Cambridge Univ. Press 1996) 
(1797). See generally R. George Wright, Treating Persons as Ends in Themselves: The Legal Implications 
of a Kantian Principle, 36 U. RICH. L. REV. 271, 277 (2002) (“Kant has no general objection to using 
people, or to using them as a means. Life could hardly be possible otherwise . . . The critical difference is 
between treating a person merely as a means, and treating a person as a means and at the same time as an 
end.”).

83 KANT, supra note 80, at 54.

84 See ANDREWS REATH, AGENCY & AUTONOMY IN KANT’S MORAL THEORY 121 (2006) (stating 
that “Kant’s general thesis [is] that autonomy of the will is the foundation of morality”); Candace Cummins 
Gauthier, Philosophical Foundations of Respect for Autonomy, 3 KENNEDY INST. ETHICS J. 21, 24 (1993) 
(“When we treat another person as an end in himself or herself, we respect that person’s dignity and 
 intrinsic value as a rational and autonomous being.”).
Kant’s practical imperative has tremendous intuitive appeal. Indeed, “[f]ew moral criticisms strike deeper than the allegation that somebody has used another; and few ideals gain more praise than that of treating others as persons.” Scholars today employ Kant’s insight in a wide range of settings. Charles Fried argues, for example, that “all basic liberties” trace their roots to “autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others.” Alan Gewirth similarly argues that “[a]ll the human rights . . . have as their aim that each person have rational autonomy in the sense of being a self-controlling, self-developing agent who can relate to other persons on a basis of mutual respect and cooperation, in contrast to being a dependent, passive recipient of the agency of others.” David Cole asserts that it is morally wrong for the government to detain individuals during times of emergency “without any objective evidence of suspicion simply to make the public feel better,” because such detentions treat “human beings as means rather than ends in themselves.” Frederick Schauer points out that the “notion of individual sovereignty, or individual autonomy, now associated with Kant, provides the foundation of a theory of freedom of speech premised on the ultimate sanctity of individual choice.” Bioethicists demand that scientists not use human beings for medical experimentation without their consent, because doing so would constitute using the subjects as a mere means to the scientists’ ends. Physicians obtain their patients’ informed consent prior to treatment for the same fundamental reason, recognizing that withholding pertinent information

85 See Fred Feldman, Introductory Ethics 123 (1978) (acknowledging the theory’s intuitive appeal).


87 See, e.g., George C. Christie, The Defense of Necessity Considered from the Legal and Moral Points of View, 48 Duke L.J. 975, 1042 (1999) (“[T]he proposition that it is permissible intentionally to kill an innocent person in order to save a larger number of other people is highly suspect. . . . The proposition certainly seems to violate Kant’s injunction that one must treat people as ends in themselves and never as means.”); Nancy J. Hirschmann, Abortion, Self-Defense, and Involuntary Servitude, 13 Tex. J. Women & L. 41, 46 (2003) (“The pro-life argument, though it appears to be concerned with life as an end-in-itself, in fact is not at all concerned with women’s lives, only the lives of fetuses. The position is therefore illogical, inconsistent, and moreover—by treating women solely as means to the fetuses’ ends—morally wrong.”).

88 Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 233 (1992); see also id. (“Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons.”).


91 Schauer, supra note 18, at 68; accord David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 62 (1974) (stating that Kant articulated “the moving thought that each rational being is a sovereign legislator in the realm of ends” and that this thought helps to explain the importance of free expression).

92 See Dean Cocking & Justin Oakley, Medical Experimentation, Informed Consent and Using People, 8 Bioethics 293, 294-95 (1994) (making this argument).
would manifest a failure to show proper respect for their patients’ autonomy and would treat patients “merely as a means to whatever purpose the provider has in withholding or misrepresenting this information.”

The United States’ justice system instrumentalizes jurors in two ways. First, when properly summoned by the government, citizens are compelled to serve on juries and use their rational capacities entirely in service to the litigants’ and the government’s ends. Second, although we impress upon jurors that they bear the heavy responsibility of rendering accurate verdicts, we routinely withhold relevant, readily available information that rational jurors would want to consider before reaching their conclusions. Although my primary concern here lies with the latter, I consider both of these infringements in turn. By first briefly articulating reasons for concluding that compulsory jury service is an infringement upon citizens’ autonomy, but that this infringement can probably be morally justified, I further lay the groundwork for my arguments concerning the exclusionary rules upon which much of our evidentiary regime is problematically based.

B. Compulsory Jury Service

Like their medieval predecessors, modern jurors do not volunteer for the job. Citizens are summoned for jury service and can be fined or imprisoned if they fail to appear. Because of its compulsory nature and the conflicts that it often presents with one’s work and family obligations, many citizens regard jury duty as a nuisance. As

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93 Gauthier, supra note 84, at 31; see also Steve Clarke, Informed Consent in Medicine in Comparison with Consent in Other Areas of Human Activity, 39 S.J. PHIL. 169, 174 (2001) (stating that medical ethicists agree “that the underlying purpose of the doctrine of informed consent in medicine is to ensure that patients are able to provide genuinely autonomous consent”).

94 See Seipp, supra note 34, at 78 (explaining that medieval jurors were summoned by the local sheriff); id. at 79 (“The entire system depended on coercion. Jurors were not volunteers. They were compelled to appear, compelled to swear and compelled to remain until their duty was done. Jurors . . . were virtually prisoners of the justices, . . . subject to prison and fines for any breach of their duty.”).


96 See id. § 1866(g) (stating that “[a]ny person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than three days, or both”); see also Nancy S. Marder, The Myth of the Nullifying Jury, 93 NW. U. L. REV. 877, 933 (1999) (“Although a juror can be excused from service because of extreme hardship or for failure to meet the statutory requirements for service, jury service is otherwise obligatory.”).

97 See Jon M. Van Dyke, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 111 (1977) (“Although jury service is supposed to be a right and privilege, most people consider it a nuisance.”); Nancy J. King, Juror Delinquency in Criminal Trials in America, 1796-1996, 94 MICH. L. REV. 2673, 2697 (1996) (“People who resist jury duty today are apprehensive about lost income, the inconvenience of being absent from work and family, unpleasant working conditions, and long waits.”); see also Nancy J. King, Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials, 49 VAND. L. REV. 123, 124 (1996) (“The financial and emotional burdens of jury duty can be significant even in mundane cases.”).
Richard Posner puts it, “[j]ury service is . . . a form of conscription; and conscription is not popular in this country.”

Even without regard to the evidentiary regime under which a justice system operates, compulsory jury service is itself an infringement upon citizens’ autonomy. When forced to serve as jurors, citizens are instrumentalized. They are compelled to use their rational capacities entirely in service to the government’s and the litigants’ objectives, rather than in service to their own. “The core of Kant’s conception of autonomy,” Andrews Reath writes, “is that rational agents are sovereign over the employment of their rational capacities.” When made to sit in judgment in a civil or criminal case, jurors are not free to use their rational energies as they see fit. Instead, they are forced to make judgments about the factual issues that are placed before them.

In keeping with a societal judgment that extends back to the Middle Ages, however, this infringement upon citizens’ autonomy can probably be morally justified. Jury service has long been widely regarded as a “duty, honor, and privilege” and a fundamental obligation of citizenship. The Supreme Court has analogized jury service to compulsory enrollment in the military, stating that both are duties that citizens owe to their nation and that neither amounts to “involuntary servitude” within the meaning of the Thirteenth Amendment. One can indeed plausibly argue that the government may infringe upon its citizens’ autonomy through compulsory jury service and the military draft, in exchange for the benefits that those same citizens receive from living in the society that the justice and national-defense systems serve.

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99 REATH, supra note 84, at 173.

100 See supra notes 35-36 and accompanying text (noting the compulsory nature of jury service during the medieval era).


103 See Butler v. Perry, 240 U.S. 328, 333 (1916) (stating that the Thirteenth Amendment “certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc.”); Selective Draft Law Cases, 245 U.S. 366, 390 (1918) (“W[e] are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation . . . can be said to be the imposition of involuntary servitude . . . .”); cf. Hurtado v. United States, 410 U.S. 578, 589 n.11 (1973) (holding that paying only one dollar per day to individuals detained as material witnesses does not render the detention involuntary servitude in violation of the Thirteenth Amendment). See generally U.S. Const. amend. XIII (“Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”).

104 See, e.g., William A. Galston, A Sketch of Some Arguments for Conscription, 23 Phil. & Pub. Pol’y Q. 2, 3 (Summer 2003) (arguing that it is morally permissible for the government to require
There also is good reason to believe that compulsory jury service is a rare species of autonomy infringement that can be morally justified with relative ease. Kant’s paradigmatic example of an immoral infringement on others’ autonomy is a “deceitful promise,”105 a promise that is designed to elicit desired behavior by taking advantage of others’ ignorance of one’s true intentions. Kant’s example is well chosen. Short of instances of outright slavery, the concealment of information pertaining to intentions or other relevant facts seems almost inevitably to lie at the heart of situations in which one “feels used” in the morally objectionable way that Kant’s practical imperative captures.106 Such concealment is morally condemnable on at least two fronts: it frustrates a person’s ability to use her rational capacities in service to her own ends, and it serves as an instrumentalizing vehicle for capitalizing on the manner in which the person will use her rational capacities in the absence of the concealed information. If I deceitfully promise you that I will perform a certain action in the future, I frustrate your ability to decide how you can best achieve your own objectives, and I benefit from the decisions you will likely make while falsely believing that I will do what I have promised to do.

Compulsory jury service, in and of itself, involves no such concealment or deception. It does not seek to take advantage of the way in which jurors will use their rational capacities while laboring under false beliefs. Nor does it seek to place jurors’ powers of ratiocination in a weakened position. Indeed, it does not even presume that jurors’ rational powers can be easily compromised. To the contrary, the conscription of randomly selected lay jurors is a profoundly democratic acknowledgement of all citizens’ ability rationally to evaluate complex bodies of evidence. Compulsory jury service is an infringement upon citizens’ autonomy, in other words, but it is an infringement that comes with a compliment.

Although the compulsory nature of jury service can probably be morally justified, it does nevertheless invite close scrutiny of how the government treats jurors once it has pressed them into service. Consider the comparison that the Court has drawn between jury service and the military draft.107 It is one thing to say that it is morally permissible for the government to force citizens to wage war on the nation’s behalf; it is quite another to say that it is morally permissible for the government to send soldiers into battle without providing them with essential and readily available equipment and information. Similarly, to say that the obligations of citizenship entail sitting in judgment when summoned by the government is not at all to say that the government may treat jurors however it likes. The circumstances under which the government forces citizens to carry

“mandatory military service in the nation’s defense” because “each citizen has a duty to do his or her fair share to sustain the social arrangements from which all benefit”). But cf. Robert K. Fullinwider, Conscription—No. 23 PHIL. & PUB. POL’Y Q. 8, 8 (Summer 2003) (arguing that conscription is morally permissible only when the nation’s military cannot be adequately staffed by volunteers).

105 See supra note 83 and accompanying text.

106 Cf. Dworkin, supra note 23, at 14 (“Both coercion and deception infringe upon the voluntary character of the agent’s actions. In both cases a person will feel used, will see herself as an instrument of another’s will.”).

107 See supra note 103 and accompanying text.
out their courtroom duties are themselves susceptible to moral assessment. Autonomy is not like a bubble that, once burst, is gone forever. Even though it may be morally permissible to infringe upon citizens’ autonomy by compelling them to sit on a jury, citizens retain their moral entitlement not to be forced to carry out their duties under circumstances that unjustifiably infringe upon their autonomy. As I shall now argue, however, this is precisely what the rules of evidence often do.

C. Withholding Relevant Evidence

1. The Core Moral Entitlement to All Relevant, Readily Available Evidence

In 1950, philosopher Rudolf Carnap influentially identified what he called the “requirement of total evidence.”\(^\text{108}\) Carnap pointed out that, when evaluating the reliability of an inductively drawn conclusion, one must take into account all of the available relevant evidence.\(^\text{109}\) Carnap wrote:

If a judge in determining the probability of the defendant’s guilt were to disregard some relevant facts brought to his knowledge; if a businessman tried to estimate the gain to be expected from a certain deal but left out of consideration some risks he knows to be involved; or if a scientist pleading for a certain hypothesis omitted in his publication some experimental results unfavorable to the hypothesis, then everybody would regard such a procedure as wrong.\(^\text{110}\)

Of course, gathering and assessing evidence costs time, money, and energy, and the limited supply of those decision-making resources often will compel a person to make a choice before fully considering all of the evidence that might logically bear on the decision at hand.\(^\text{111}\) The total-evidence requirement does, however, articulate “a norm of rationality” that a decision-maker should endeavor to meet.\(^\text{112}\) When using inductive reasoning to draw a conclusion—which is precisely what jurors do when trying to

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\(^\text{108}\) Rudolf Carnap, Logical Foundations of Probability 211 (1950). Carnap did not regard the requirement as one of his own devising. See id. at 211-12 (“The requirement has been recognized since the classical period of the theory of probability.”).

\(^\text{109}\) See id. at 211.

\(^\text{110}\) Id.

\(^\text{111}\) See Roderick M. Chisholm, Evidence as Justification, 58 J. Phil. 739, 741-42 (1961) (stating that few decision-makers could fully satisfy the total-evidence requirement); Andrew McLaughlin, Rationality and Total Evidence, 37 Phil. Sci. 271, 273 (1970) (“What now appears to be the understanding of this requirement is that it is an ideal which can be approximated but never reached.”); see also Antonio R. Damasio, Descartes’ Error: Emotion, Reason, and the Human Brain 170-74, 193 (1994) (discussing the daunting neurological challenges posed by trying to assess all of the factors that might logically bear on a decision); Todd E. Pettys, The Emotional Juror, 76 Fordham L. Rev. ___ [forthcoming December 2007] (discussing Damasio’s work on this point).

\(^\text{112}\) McLaughlin, supra note 111, at 272.
ascertain the facts of a case—a rational person wishes to consider as much of the available relevant evidence as is practicable under the circumstances. To acknowledge that evidence-gathering does sometimes present impractical costs, I will refer to the information that a rational decision-maker wishes to consider as “relevant, readily available” evidence.

The thrust of the total-evidence requirement certainly was not lost on the First Amendment’s framers. As I indicated earlier, the constitutional guarantee of the freedom of speech is based in part on the belief that, when a person is making a choice, he or she should have access to all of the available information that rationally bears upon the decision. Whether by chance or by design, the same epistemological insight was reflected in the factfinding system that England used between the thirteenth and early eighteenth centuries, when judges and jurors generally had access to all of the evidence that they and the litigants deemed worthy of consideration. The same insight is frequently manifested today in bench trials, in which judges “persistently treat the law of evidence as a counterproductive encumbrance to be jettisoned whenever possible.”

Paul Kirgis explains:

In contrast to deductive inferences, inductive inferences involve conjectures about unobserved events or conditions in the world. . . . Where deduction relies on syllogistic reasoning from assumed general propositions, induction draws conjectural conclusions from data observed in the world. Thus, arguments such as “A planned to kill B; therefore, A probably did kill B” are inductive because they require speculation about the likelihood that a person who had an intent to kill actually did kill.

At least for purposes of adjudication, inductive reasoning may be used to reach conclusions of three basic types: that an event or condition in the past or present probably has occurred or is occurring; that an event or condition in the future probably will occur; or that a hypothetical event or condition probably would occur given some postulated set of circumstances, a type of reasoning known as the counterfactual conditional. . . .

Of these types, the first, regarding actual historical events or conditions, is the most prevalent in adjudication. Virtually all of the “who, what, when, and where” questions in litigation call for this type of inference.


See McLaughlin, supra note 111, at 276 (stating that a rational scientist will take into account the costs of gathering evidence and will endeavor to consider “the optimum amount” of evidence).

See supra notes 17-20 and accompanying text (noting some of the First Amendment’s theoretical underpinnings).

See supra notes 33-42 and accompanying text (discussing the evidentiary approach taken in England during this period).

Schauer, supra note 24, at 166; see also Peter Tillers, What Is Wrong with Character Evidence?, 49 HASTINGS L.J. 781, 789 (1998) (stating that the rules prohibiting character evidence are relaxed in bench trials); cf. Richard A. Posner, Comment on Lempert on Posner, 87 VA. L. REV. 1713, 1714 n.8 (2001) (“Most lawyers and judges have quite a relaxed sense of the rules of evidence, often ignoring them by tacit agreement and not only in bench trials.”).
Because a rational person desires access to as much of the pertinent evidence as is practicable when making a decision, and because each adult is sovereign with respect to the use of his or her own rational capacities, the government infringes upon individuals’ autonomy when it compels them to make a decision but conceals relevant, readily available information. As David Strauss observes, for example, the constitutional guarantee of the freedom of speech reflects Americans’ judgment that the government immorally infringes upon a person’s autonomy when it “interference[s] with a person’s control over her own reasoning processes” by restricting her access to information. That certainly is no less true when the government is the entity that has forced the person to make the decision in the first place. When the government imposes decision-making duties upon a citizen and gives that citizen every reason to believe that his or her decision is a significant one, the government infringes upon the citizen’s autonomy when it conceals readily available information that rationally bears upon his or her analysis.

Continental justice systems recognize the moral significance of factfinders’ autonomy, and our own Supreme Court has come tantalizingly close to acknowledging it, as well. As Mirjan Damaška explains, both lay and professional judges in Continental systems are free to inject themselves in proof-taking if they so choose. Their freedom to do so is highly valued, because it is perceived as flowing from their responsibility for the correct decision—“the truth.” The notion that an adjudicator should accept responsibility for a judgment while at the mercy of information supplied by others bruises deeply ingrained Continental legal sensibilities.

The Supreme Court made a closely related point when explaining the rule that criminal defendants in American courts ordinarily cannot preclude the admission of damaging evidence by simply stipulating to certain facts. The Court stated that jurors “who hear a story interrupted by gaps of abstraction”—that is, a story where key parts of the narrative are told through bare factual stipulations, rather than through traditional testimony and exhibits—“may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard.”

Jurors themselves point suggestively toward an entitlement to hear all of the relevant evidence that the parties have readily at their disposal. In a survey of New

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118 See supra notes 81-93 and accompanying text (discussing Kantian autonomy).


121 DAMAŠKA, supra note 3, at 91.

Mexico citizens who served as jurors in criminal cases, for example, Thomas Grisham and Stephen Lawless asked the former jurors whether they believed “that evidence which was ruled inadmissible on legal grounds should have been allowed in order to help [them] make a decision.”\textsuperscript{123} Seventy-five percent of the respondents answered that question in the affirmative.\textsuperscript{124}

There is every reason to believe that jurors do indeed desire an opportunity to make full use of their rational capacities. We ask jurors to make decisions that are of tremendous consequence to the lives, liberties, and fortunes of their fellow citizens, and we go to great lengths to be sure that they understand the gravity of that responsibility.\textsuperscript{125} We tell them, for example, that they are the “sole and exclusive judge of the facts”\textsuperscript{126} and that “[i]t is especially important that [they] perform [their] duty of determining the facts diligently and conscientiously, for ordinarily there is no means of correcting an erroneous determination of the facts by a jury.”\textsuperscript{127} If the stress-related symptoms that jurors often endure are any indication, jurors do take their task very seriously. Citizens frequently report experiencing physical illnesses and psychosocial difficulties as a result of the time they spent in the jury box.\textsuperscript{128} These can include “insomnia, nightmares, flashbacks, stomach distress, nervousness, irritability, lack of concentration, problems in personal relations, extreme moodiness and mood swings, headaches, heart palpitations, depression, crying, [and] numbness.”\textsuperscript{129} It is not uncommon for jurors in emotionally disturbing

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\item See id. (reporting that seven percent of the respondents answered “always,” eighteen percent answered “usually,” and fifty percent answered “sometimes”).
\item See, e.g., 1 KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 12.01, at 123 (5th ed. 2000) [hereinafter O’MALLEY, CRIMINAL INSTRUCTIONS] (“Justice—through trial by jury—depends upon the willingness of each individual juror to seek the truth from the same evidence presented to all the jurors here in the courtroom. . . .”); id. § 20.01, at 891 (“What the verdict shall be is the exclusive duty and responsibility of the jury.”); 3 KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL § 103.01, at 107 (5th ed. 2000) [hereinafter O’MALLEY, CIVIL INSTRUCTIONS] (“All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.”); id. § 106.01, at 181 (“You are judges—judges of the facts.”).
\item O’MALLEY, CIVIL INSTRUCTIONS, supra note 125, at § 101.10, at 26.
\item O’MALLEY, CRIMINAL INSTRUCTIONS, supra note 125, at § 10.01, at 5.
\item See ADLER, supra note 11, at 37-38 (noting the stress-related physical problems that jurors in high-stakes cases often suffer); cf. Old Chief v. United States, 519 U.S. 172, 187 (1997) (“Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal.”).
\item Thomas F. Hafemeister & W. Larry Ventis, Juror Stress: What Burden Have We Placed on Our Juries?, 56 TEX. B.J. 586, 586 (1993); see also Stanley N. Kaplan & Carolyn Winget, The Occupational Hazards of Jury Duty, 20 BULL. AM. ACAD. PSYCHIATRY L. 325, 325-32 (1992) (reporting the results of a study from four criminal trials and recounting a variety of stress-related symptoms that numerous jurors experienced); James E. Kelley, Addressing Juror Stress: A Trial Judge’s Perspective, 43 DRAKE L. REV. 97, 115 (1994) (stating, on the basis of questionnaires sent to former jurors, that “jurors
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trials to suffer symptoms of post-traumatic stress. In death-penalty cases, jurors often worry for months and even years afterward about whether they made the right decision. The juror who is working diligently to do her job rationally and well, despite the costs that those efforts cause her to incur in her own life, is not likely to want to do less than her rational best by compromising her sovereignty over her rational capacities.

Significantly, we never ask jurors whether they are, in fact, willing to compromise their autonomy by allowing the court to withhold evidence that rationally bears upon their verdicts. Of course, if jurors did grant their consent, the moral concerns raised by exclusionary rules could be satisfactorily addressed. Doctors, for example, are not morally obliged always to force treatment-related information upon patients who autonomously declare that they do not wish to hear it. As Dean Cocking and Justin Oakley point out, “it is possible for a person to give their informed and autonomous consent to a proposal that certain kinds of information about their treatment might be withheld from them.” Similarly, we could ask prospective jurors whether they are willing to participate in a factfinding process in which relevant information sometimes will be concealed, and, if they are not, we could release them from their jury-service obligations. Yet we do not make that path available.

When our exclusionary rules operate to conceal relevant, readily available information from a jury—which is precisely what those rules typically are designed to do—we infringe upon jurors’ deliberative autonomy and treat them merely as a means to the objectives that the government and the litigants hope to achieve through the concealment, whatever those objectives happen to be. We compel jurors to make highly significant decisions, but yet we withhold some of the readily available informational

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130 See Leigh B. Bienen, Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials, 68 Ind. L.J. 1333, 1348 (1993) (“The symptoms that jurors suffer in emotionally disturbing trials include post-traumatic guilt and other symptoms familiar to those who work in the area of post-traumatic stress.”). To say that jurors experience symptoms consistent with post-traumatic stress disorder does not mean, however, that jurors’ symptoms ordinarily reach a threshold warranting a formal diagnosis of that condition. One study’s authors reported that they could find no evidence “that jurors are more likely than the general population to experience PTSD.” Daniel W. Shuman et al., The Health Effects of Jury Service, 18 Law & Psychol. Rev. 267, 298 (1994).

131 See Adler, supra note 11, at 36-37 (recounting a capital case in which jurors worried for months afterward about whether they had rendered the proper verdict); Bienen, supra note 130, at 1339 (“Lawyers who have interviewed capital jurors in several different jurisdictions report preliminary findings that suggest that jurors are profoundly affected, and sometimes remain disturbed, by the experience of being a juror even years after the event.”).

132 Cocking & Oakley, supra note 92, at 299; cf. Gonzales v. Carhart, 127 S. Ct. 1610, 1634 (2007) (“Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense.”).
tools that an autonomous, rational person would use to do the job. Because exclusionary rules pervade our evidence codes, “frequently the jury cannot learn of matters which would lead an intelligent person to a more correct knowledge of the facts.”\textsuperscript{133} If a juror works hard to reach an accurate verdict and then later hears about excluded evidence that might rationally have changed the way she voted, the juror might instinctively feel that she has been used, that a verdict has been unfairly extracted from her, and that the government has failed to pay her rational capacities the respect they are owed. It would be difficult to convince her that she is mistaken.

2. 

\textbf{Jury Service as a Form of Self-Government}

Citizens’ moral interest in having access to the decision-making information they need, free from official interference, is especially strong in the realm of self-government. The First Amendment again provides an illustration, this time through its staunch protection of political speech. As Alexander Meiklejohn explained, citizens in a self-governing society must be free to decide for themselves what is true.\textsuperscript{134} Government may restrict political speech, Meiklejohn argued, only when the expression occurs in a “social situation which, for the time, renders the community incapable of the reasonable consideration of the issues of policy which confront it.”\textsuperscript{135} The Supreme Court’s political-speech jurisprudence tracks Meiklejohn’s argument quite closely. The Court has stressed that political speech is “situated at the core of our First Amendment”\textsuperscript{136} and is “entitled to the fullest possible measure of constitutional protection.”\textsuperscript{137} Yet the protection afforded to political speech is not unlimited. As I noted in my introductory comments,\textsuperscript{138} for example, the government may restrict speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”\textsuperscript{139} The Court’s insistence that the danger must be “imminent” flows naturally

\textsuperscript{133} FRANK, supra note 9, at 123.

\textsuperscript{134} See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26-27 (1960 (making this point). Modern arguments about the importance of unhindered expression often trace their roots to John Stuart Mill. In one among many influential passages in \textit{On Liberty}, Mill wrote:

[T]he peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.


\textsuperscript{135} MEIKLEJOHN, supra note 134, at 49.


\textsuperscript{138} See supra notes 21-22 and accompanying text.

from the Meiklejohnian reasoning in Justice Brandeis’s concurring opinion in *Whitney v. California*:

> Fear of serious injury alone cannot justify suppression of free speech and assembly. . . . To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. . . .

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify suppression. Such must be the rule if authority is to be reconciled with freedom.140

The moral values underlying the Court’s treatment of political speech are relevant for our purposes here because, as Akhil Reed Amar and others have reminded us in recent years, juries are an important dimension of the American system of self-government.141 Like their medieval predecessors,142 American jurors stand as the final barrier between the law and the people; it is through their judgments that the law is applied. Through their verdicts, jurors exercise a large measure of control over the way in which the law is, or is not, brought to bear in particular cases. Amar writes that “the jury idea was absolutely central to the Founders’ Bill of Rights, and their distinctive constitutional idea of popular self-government.”143 Linda Kerber points out that

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140 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring). Compared to the Court’s earlier jurisprudence, *Brandenburg*’s imminence requirement significantly narrowed the government’s ability to restrict dangerous speech. In *Whitney*, a majority of the Court had declared that it was “not open to question” that the First Amendment permitted government officials to ban “utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means.” *Id.* at 371; see also *Brandenburg*, 395 U.S. at 447 (stating that the approach taken in *Whitney* had “been thoroughly discredited by later opinions”); *Black*, 538 U.S. at 359 (endorsing *Brandenburg*’s requirement that the harm be both imminent and likely to occur).

141 See, e.g., AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 121-22 (1997) (“For the Framers, . . . the criminal jury was much more than an incorruptible fact finder. It was also, and more fundamentally, a political institution embodying popular sovereignty and republican self-government. Through jury service, citizens would learn their rights and duties, and actively participate in the governance of society.”); *id.* at 122 (stating that jury service has always been seen in the United States as “a badge of first-class citizenship, no less than the right to vote,” and that “throughout American history and constitutional discourse, the right to vote and the right to serve on juries have stood as fraternal twins, joined arm in arm”); see also David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1783 n.426 (2005) (describing Amar’s work as “part of a broader academic trend toward renewed appreciation for the virtues of juries as instruments of participatory and deliberative democracy”).

142 See supra notes 41-42 and accompanying text (discussing medieval jurors’ law-applying power).

“[m]embers of the founding generation construed jury service to be central to the process of democracy; it was the context in which average citizens exercised reflective judgment.”

Robert Walters and his coauthors assert that “the jury is arguably the purest form of democracy and self-governance.” The United States District Court for the Eastern District of Tennessee recently observed that “[t]he jury is as much an institution of self-government as is the election of public officials. Jury service on the part of citizens of the United States thus has become one of the most important and basic rights and obligations of citizenship.” Alexis de Tocqueville found during his travels in the United States more than a century and a half ago that “the jury is . . . one form of the sovereignty of the people” and that “[t]he jury is both the most effective way of establishing the people’s rule and the most efficient way of teaching them how to rule.”

Exclusionary rules thus violate jurors’ autonomy in a particularly sacred realm of citizens’ self-governing activity—a realm in which the value of having access to all relevant, readily available information is especially compelling. Consider, by way of close analogy, Professor Amar’s discussion of the interplay between the Fourth Amendment exclusionary rule (under which evidence seized during an illegal search or seizure is sometimes declared inadmissible in a subsequent criminal trial) and the Sixth Amendment’s guarantee, in criminal prosecutions, of “a speedy and public trial, by an

necessary protection against governmental encroachments upon liberty and a form of republican self-government.”; id. at 498 (“Jurors vote on whether to convict. Jurors apply the law, thereby governing the society. . . . In this regard, the role of a juror is the role of a citizen (and not merely a person) who actively participates in the governing process.”); Alan Howard Scheiner, Note, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power, 91 COLUM. L. REV. 142, 153 (1991) (“The jury was the only agency of governmental power that could not be controlled by the oligarchs—it was, in fact, the last remnant of the self-government through community that the Antifederalists believed was about to be irretrievably lost.”).

144 LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 129 (1998); accord Lilly, supra note 76, at 55 (stating that jury service gives citizens “a measure of sovereign authority that is seldom assigned to lay persons”).


148 Id. at 276.

149 See Hudson v. Michigan, 126 S. Ct. 2159, 2163-68 (2006) (discussing the circumstances in which the exclusionary rule is applied today); see also U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”).
impartial jury of the State and district wherein the crime shall have been committed.”\textsuperscript{150} 
Amar writes:

\begin{quote}
[T]he public trial was designed to infuse public knowledge into the trial itself, and, in turn, to satisfy the public that truth had prevailed at trial. A public trial would protect innocence but would make life more difficult for the guilty. All these values have been turned upside down by modern doctrines that—in the name of the Constitution, no less—exclude evidence the public knows to be true. Put differently, even if a judge can prevent the jury from learning of some fact, she often cannot prevent the larger public from, at some point, learning of it. And the gap between the public truth and truth allowed in the courtroom can demoralize the public, whose faith in the judicial system is a key goal of the public trial ideal.\textsuperscript{151}
\end{quote}

Similarly, after emphasizing the jury’s central function of passing judgment on behalf of the local community, and after struggling to square that function with the Fourth Amendment exclusionary rule, Amar asks, “[H]ow can the jury judge well on behalf of the community if, because of upside-down exclusion rules, it is denied reliable information that is known to the general community?”\textsuperscript{152}

One can ask similar questions regarding the exclusionary provisions of the rules of evidence. How can jurors be autonomous participants in a self-governing society if officials insist on concealing relevant, readily available information that bears directly on jurors’ decision-making task? If citizens are trusted rationally to evaluate political candidates’ many claims and the facts that bear on those claims’ truth, why is it that those same citizens are so quickly presumed to be susceptible to irrationality in the courtroom? The voting booth and the jury box are the two central forums in which American citizens exercise their right to govern themselves. We would be quick to object on moral grounds if officials decided that citizens were not rationally fit to evaluate certain kinds of information regarding their choice of political leaders. We are autonomous beings who are morally entitled to be deemed capable of rationally evaluating even the most complex political issues, we would argue, and officials necessarily infringe upon that autonomy when they presume to the contrary and conceal relevant information from us. Why do we not make those same moral arguments when citizens’ self-governing activity takes the form of deciding how the law will be applied in particular cases?

3. Irrationality and Harm to Litigants as Bases for Withholding Relevant Evidence

Fears of juror irrationality, and the accompanying risk of harm to litigants, are the leading justifications for withholding relevant evidence from jurors. There are indeed occasions when those fears are sufficiently compelling to justify infringing upon jurors’

\textsuperscript{150} U.S. CONST. amend. VI.

\textsuperscript{151} AMAR, supra note 141, at 119.

\textsuperscript{152} Id. at 124.
autonomy. Unfortunately, our existing exclusionary rules are poorly calibrated to distinguish between those instances in which exclusion is morally justified and those instances in which it is not.

a. Basic Principles

Because our capacity to reason grounds our moral claim to autonomy, the government plainly infringes upon that autonomy when it presumes that we lack, or cannot effectively use, the very same rational capacities that serve as our autonomy’s source. As Cass Sunstein writes when explaining the “listener autonomy” theory of free speech, the government cannot insult the moral autonomy of its citizens by stopping them from hearing what other people have to say—especially if the reason the government acts is its fear that citizens will be influenced or persuaded by what is said. This is a unique invasion into each individual’s moral and deliberative capacities.

The exclusionary rules that courts most frequently apply are problematically based squarely on the fear that jurors would use the concealed evidence inappropriately, either by responding to it with a verdict that is driven by overpowering emotions (such as by convicting a murder defendant in a fit of rage provoked by grisly photographs of the victim’s body, even though the government has not proved the defendant’s guilt beyond a reasonable doubt), by giving the evidence more weight than it rationally deserves (such as by heavily crediting hearsay statements, even though the declarant was not under oath, in the jury’s presence, and subject to immediate cross-examination at the time he or she uttered the statements), or by responding to the evidence with a verdict that is rational but based upon undesirable reasons (such as by convicting a criminal defendant in order to punish him for his violent behavior on unrelated prior occasions, even though the

153 See supra notes 81-84 and accompanying text.

154 See BAKER, supra note 19, at 56 (“[O]utlawing acts of the speaker in order to protect people from harms that result because the listener adopts certain perceptions or attitudes disrespects the responsibility and freedom of the listener.”); DWORKIN, supra note 20, at 207-08 (“It is obviously inconsistent with respecting citizens as responsible moral agents to dictate what they can read on the basis of some official judgment about what will improve or destroy their characters, or what would cause them to have incorrect views about social matters.”); Aditi Bagchi, Deliberative Autonomy and Legitimate State Purpose Under the First Amendment, 68 ALB. L. REV. 815, 816 (2005) (“[T]he government may not act in a manner that denies our capacity to reason and deliberate.”).

155 CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 140 (1993); see also id. (“The principle of listener autonomy helps explain Justice Brandeis’ insistence that the ‘fitting remedy’ for harmful speech is ‘more speech, not enforced silence.’ More speech is the ‘fitting’—not necessarily the adequate—remedy precisely because it does not insult the moral autonomy of listeners.”) (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

156 See FED. R. EVID. 403 (allowing courts to exclude relevant evidence that poses a high risk of unfair prejudice).

157 See id. 802 (stating the general rule barring the admission of hearsay).
government has not proved beyond a reasonable doubt that the defendant is guilty of the crime charged.\textsuperscript{158}) As Bentham said regarding the competency rules that England employed two centuries ago, such rules demean those factfinders whose presumed mental weaknesses occasioned the rules’ enactment.\textsuperscript{159} It plainly offends jurors’ autonomy to withhold from them relevant, readily available evidence because we doubt they will make proper use of the rational capacities on which their autonomy is based.

To say that the government infringes upon our autonomy when it conceals information because of how we might handle it, however, is not to say that such infringements can never be justified. Just as compulsory jury service is an infringement that probably is morally permissible,\textsuperscript{160} there are occasions when it is morally appropriate for the government to restrict individuals’ access to relevant information due to fears that they would not respond to the information in a reasonable manner. The government is not morally obliged to turn a blind eye to the fact that people do sometimes behave irrationally and that others can be harmed as a result.\textsuperscript{161}

When trying to discern the line that separates morally permissible and morally impermissible instances of evidence concealment, we can again find at least preliminary guidance by examining the treatment of citizens’ deliberative autonomy in the First Amendment setting. David Strauss persuasively argues that there are two kinds of speech that the government may restrict without fear of wrongly violating citizens’ autonomy: “false statements, and speech that seeks to elicit action before the hearer has thought about the speech and possible answering arguments.”\textsuperscript{162} Restrictions on false statements (such as false advertisements) are morally permissible in Strauss’s view because “those restrictions do not manipulate or deny autonomy. No one wants to make decisions on the basis of false information.”\textsuperscript{163} Restrictions on speech aimed at provoking immediate, unexamined conduct are permissible, he contends, because the speech itself is aimed at

\textsuperscript{158} See id. 404 (stating the general rule barring the admission of evidence aimed at proving that a person behaved in accordance with particular character traits).

\textsuperscript{159} See BENTHAM, supra note 1, at 616 (quoted supra at note 72).

\textsuperscript{160} See supra notes 94-107 and accompanying text (discussing the morality of compulsory jury service).

\textsuperscript{161} Kent Greenawalt writes:

The government must protect citizens from social harms, and many fellow citizens do not act in a rational and autonomous way. If some communications are especially likely to lead irrational people to do harmful things, why must the government permit them access to those communications as if they were rational and autonomous, rather than protecting potential victims of their irrational actions?

Greenawalt, supra note 119, at 151.

\textsuperscript{162} Strauss, supra note 120, at 336.

\textsuperscript{163} Id. at 357; accord Brison, supra note 19, at 333 (“In the area of advertising, . . . we consider it appropriate for government to deprive us of access to false or misleading speech. This is seen as enhancing, not hindering, autonomy.”).
violating listeners’ autonomy by prompting them to act before they have had a fair opportunity to use their rational capacities.\textsuperscript{164}

Thomas Scanlon would go even further, concluding that there may be instances in which “citizens’ rational capacities are not severely diminished,” but the harms that might occur if people were allowed to make their own choices are so great—such as if television advertisements for cigarettes persuaded rational individuals to begin smoking—that respect for individuals’ autonomy must give way to competing values.\textsuperscript{165} Some might not be willing to go as far as Scanlon; indeed, Scanlon himself initially refused to go as far as he ultimately went.\textsuperscript{166} Scanlon’s position is controversial in the First Amendment setting because it offers a rationale for paternalistic regulations that some find condescending and offensive.\textsuperscript{167} His argument seems particularly well suited, however, to considerations relating to juror autonomy. When determining whether jurors should be exposed to all of the relevant evidence at the parties’ disposal, the issue is not whether the government should paternalistically protect jurors from the consequences of their own choices. Rather, the issue is whether the disputed evidence would provoke jurors to render a verdict that inflicts undesirable harm upon one or more of the litigants. As I shall argue shortly,\textsuperscript{168} therefore, Scanlon’s argument provides a morally appealing—but narrowly applicable—basis for withholding relevant evidence from jurors even when their rational capacities are not degraded.

Together, Strauss and Scanlon thus identify three possible justifications for infringing upon decision-makers’ autonomy by restricting their access to relevant, readily available information: protecting decision-makers from false statements, protecting decision-makers from being provoked to act before they have fully used their rational capacities, and protecting decision-makers from being exposed to evidence that makes them act in a manner that is not in their best interests.

\textsuperscript{164} Strauss, supra note 120, at 336, 360-61; see also id. at 361 (“Roughly, the question is whether the consequences are so severe that it would be acceptable to engage in manipulative lying or deception to prevent them.”); Thomas Scanlon, A Theory of Freedom of Expression, 1 PHIL. & PUB. AFF. 204, 220 (1972) (“A more limited case for allowing states [to restrict speech] might rest . . . on the recognized fact that under certain circumstances individuals are quite incapable of acting rationally.”); supra notes 21-22 and accompanying text (discussing the Court’s finding that the government may restrict speech that is both aimed at producing imminent illegal behavior and likely to produce such behavior).


\textsuperscript{166} Scanlon initially offered a theory that would bar the government from ever banning speech based upon fears about certain kinds of harm that the speech might cause. See Scanlon, supra note 164, at 213-22 (advancing his “Millian Principle”). He retreated a bit several years later, however, conceding that preserving citizens’ autonomy-based right to conduct their own evaluation of speech sometimes must yield to competing values. See Scanlon, supra note 165, at 532 (concluding that “laws against deceptive advertising or restrictions such as the ban on cigarette advertising on television” are acceptable forms of government paternalism).

\textsuperscript{167} Depending on the context, some would argue that the government has no business trying to protect a citizen from the potentially harmful consequences of his or her own decisions. See supra note 154 (citing sources that take such positions).

\textsuperscript{168} See infra notes 212-16 and accompanying text (applying Scanlon’s argument to character evidence).
capacities, and protecting individuals from unacceptably high risks of serious harm.\textsuperscript{169} The first of those three is surely an inapt rationale for withholding relevant evidence. So long as evidence passes the test used to determine relevancy,\textsuperscript{170} it is manifestly the province of the jury to determine whether the evidence it sees and hears is true or false, reliable or unreliable.\textsuperscript{171} The other two infringement-justifying rationales, however, may indeed apply in trial settings. Yet those rationales justify exclusion in a far narrower range of circumstances than our rules of evidence currently permit.

b. Unfairly Prejudicial Evidence

Rule 403 of the Federal Rules of Evidence authorizes the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.”\textsuperscript{172} That rule reflects lawmakers’ judgment that jurors’ reasoning abilities can sometimes be overwhelmed by exceptionally powerful non-rational influences.\textsuperscript{173} Seeing numerous, full-color, extraordinarily graphic photographs of a murder victim’s body, for example, might make it very difficult for jurors in a murder trial to render a verdict based upon a rational appraisal of the government’s evidence. Indeed, jurors’ disgust and rage might be so overpowering that they feel compelled to express their emotions through a guilty verdict, without first patiently determining whether the government proved the defendant’s guilt beyond a reasonable doubt.\textsuperscript{174} If that occurs, jurors’ own, internal reaction to the highly charged evidence presents a threat to their deliberative autonomy and correspondingly exposes litigants to the risk of inaccurate, poorly reasoned verdicts. When those dangers appear especially threatening, it is morally permissible for a judge to exclude relevant evidence.

In his discussion of autonomy and the role of informed consent in medicine, Steve Clarke draws a useful analogy to a high-pressure sales pitch that a real-estate agent might make to a prospective homebuyer.\textsuperscript{175} If the agent’s pitch causes me, the client, impulsively to decide to make the purchase, I might find during a short cooling-off period that I don’t really want the house after all. This suggests, Clarke writes, that my own heated reaction to the sales pitch poses “an internal threat to my autonomy, caused by a

\textsuperscript{169} See supra notes 162-65 and accompanying text (identifying these justifications).

\textsuperscript{170} See FED. R. EVID. 401 (defining “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”).

\textsuperscript{171} See, e.g., United States v. Youngman, 481 F.3d 1015, 1020 (8th Cir. 2007) (“This court does not review questions involving the credibility of witnesses, which are within the province of the jury.”).

\textsuperscript{172} FED. R. EVID. 403.

\textsuperscript{173} See id. advisory committee’s note (explaining that unfairly prejudicial evidence is evidence that has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one”); see also Pettys, supra note 111, at __ [forthcoming December 2007] (discussing the positive and negative influences that emotions can exert on jurors’ decision-making processes).

\textsuperscript{174} See Pettys, supra note 111, at __ [forthcoming December 2007] (discussing the emotion-expressing function of verdicts).

\textsuperscript{175} See Clarke, supra note 93, at 170.
discrepancy between my immediate emotional reaction to the possibility of buying the property . . . and the judgment that I would make in a cooler moment, which is more authentically my own judgment.”176 Clarke argues that physicians thus need to take steps to ensure that their patients’ consent to treatment is “authentic.”177

Others make comparable arguments. 178 Dean Cocking and Justin Oakley contend, for example, that experimental medical treatments on ill human beings are immoral even when the patients grant their consent, if the consent was secured by “the deliberate manipulation of [the patients’] non-rational desires and emotions.”179 Cocking and Oakley argue that, when medical researchers elicit patients’ consent by appealing to such non-rational forces—forces “which may move [patients] independently of what their assessment of the relevant information is, or would be”—the researchers are immorally using the patients merely as a means to their own ends.180

Similarly, in a well-known amicus brief filed with the United States Supreme Court in *Washington v. Glucksberg*,181 an illustrious group of moral and political philosophers—Ronald Dworkin, Judith Jarvis, Thomas Nagel, Robert Nozick, John

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176 Id.
177 Id. at 174.
178 Id. at 174.

178 Anthony Kronman points out, for example, that contract law sometimes mandates a cooling-off period—a period immediately following a contract’s formation during which a party is permitted to back out of the deal—because lawmakers wish “to prevent the promisor from binding himself too quickly or while his judgment is impaired.” Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 786 (1983). Kronman argues that mandating a cooling-off period is problematic because it “implies a moral deficiency in those to whom it applies.” Id. at 795. He concedes, however, that it might be justified if it appears likely that one of the parties will be “influenced by strong and potentially distorting passions.” Id. at 796. One can find especially heated debates about such matters in the area of legally mandated waiting periods for abortions. Compare Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 885 (1992) (plurality opinion) (“The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision.”), and Jane Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & L. 175, 245 (1992) (“If it could actually be demonstrated . . . that a minimal waiting period, unadorned by suasive interventions, were likely to improve a woman’s decision procedures—with the state put to the proof of demonstrating a likelihood of this improvement empirically . . . —such a waiting period might be found acceptable.”), and Jonathan Klick, *Mandatory Waiting Periods for Abortions and Female Mental Health*, 16 HEALTH MATRIX 183, 185 (2006) (“My results suggest that waiting periods do improve mental health among females as evidenced by a statistically and practically significant drop in the suicide rate when states adopt waiting periods.”), with Planned Parenthood of Southeastern Pa., 505 U.S. at 918 (Stevens, J., concurring in part and dissenting in part) (“[T]here is no evidence that mandated delay benefits women or that it is necessary to enable the physician to convey any relevant information to the patient. The mandatory delay thus appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women.”).

179 Cocking & Oakley, supra note 92, at 302.
180 Id. at 303; see also id. at 304-07 (discussing the immoral manipulation of decision-making outcomes by framing information in a manner that appeals to non-rational influences).
Rawls, and Thomas Scanlon—argued broadly in favor of recognizing individuals’ autonomy-based right to physician-assisted suicide,182 but conceded that there are occasions when it would be morally permissible for the government to intervene. The authors of what has come to be known as “the Philosophers’ Brief” acknowledged that “[s]tates have a constitutionally legitimate interest in protecting individuals from irrational . . . decisions to hasten their own death.”183 They thus were willing to allow states to “assert . . . that people who are not terminally ill, but who have formed a desire to die, are, as a group, very likely later to be grateful if they are prevented from taking their own lives.”184 In a subsequent discussion of the brief, Dworkin notes that his and his coauthors’ argument recognizes that people may make such momentous decisions impulsively or out of emotional depression, when their act does not reflect their enduring convictions; and it therefore allows that in some circumstances a state has the constitutional power to override that right in order to protect citizens from mistaken but irrevocable acts of self-destruction.185

As a final example, consider the Supreme Court’s explication of some of the values underlying the First Amendment in *Ohralik v. Ohio State Bar Association*.186 In *Ohralik*, the Court held that the First Amendment permits a state bar association to discipline an attorney for soliciting clients in person, rather than through general advertisements to the public.187 In reaching that conclusion, the Court emphasized the fact that an in-person solicitation is more likely than a public advertisement to pressure a prospective client to enter into a representation agreement before fully considering all of the options:

Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. . . . In-person solicitation . . . actually may disserve the individual

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183 *Id.* at 3.

184 *Id.* at 19.


187 *See id.* at 454-62.
and societal interest . . . in facilitating “informed and reliable decisionmaking.”

As courtroom veterans know, jurors are not immune to the kinds of non-rational influences that sometimes afflict homebuyers, medical patients, individuals who wish to end their own lives, and individuals who need legal representation. Indeed, an attorney who worries about the evidentiary weaknesses of his client’s case might struggle to find ways to bring powerful non-rational influences into play. A prosecutor who goes to trial with a tenuous murder case, for example, might work hard to secure the admission of extraordinarily graphic photographs of the victim’s body, hoping that he can thereby enlist the jurors’ emotions in service to his own objectives. Looking at such efforts from the factfinder’s perspective, a rational juror might prefer not to see such evidence, knowing that it could temporarily skew her judgments in ways she would later regret. There can be little doubt, therefore, that there is a morally legitimate role for Rule 403 to play.

Unfortunately, moral considerations relating to jurors’ autonomy have played no role in defining the circumstances when Rule 403 is properly invoked. If instructions and advice from the court would help jurors recognize, confront, and ameliorate their reason-distorting emotional reactions to relevant but inflammatory evidence, for example—a possibility that seems entirely plausible but that courts and lawmakers have largely ignored—then a proper regard for jurors’ autonomy demands that the evidence be admitted with the necessary guidance from the court, rather than remain concealed from the jury altogether. Moreover, as one sees both in Steve Clarke’s discussion of the prospective homebuyer and in the authors of the Philosophers’ Brief’s discussion of the physically healthy person’s wish to end his or her own life, non-rational influences are often of only limited duration—after the passage of time, those influences frequently subside and the decision-maker regains her ability to make ordinary use of her rational capacities. Tracking the argument that David Strauss has made in the First Amendment setting, one thus would say that it is morally permissible to infringe upon jurors’ autonomy by withholding relevant evidence if—despite guidance from the court and despite the passage of time between the evidence’s admission and the beginning of the jury’s deliberations—admitting that evidence would likely provoke jurors to render a verdict before they have rationally evaluated all of the evidence in the case.

By framing the inquiry in this way, one appropriately acknowledges a direct link between the threat that non-rational influences pose to rational decision-making, on the one hand, and jurors’ autonomy, on the other. Excluding relevant evidence in the name of preventing unfair prejudice is warranted only if admitting the evidence would likely

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190 See supra notes 162-64 and accompanying text (discussing Strauss’s framework).
compromise jurors’ rational capacities, thereby instrumentalizing the jury in service to
the objectives of the evidence’s proponent and making a poorly reasoned verdict more
likely. In that circumstance, a court can fairly assume that, just like the prospective
homebuyer who has heard a heated sales pitch and the individual who has impulsively
decided to end his or her own life, jurors would be grateful if the court helped to ensure
that they were not provoked to make a final decision during a time when they were not in
full command of their rational capacities.

c. Hearsay

Of all the exclusionary rules, the hearsay rule probably occupies the greatest
measure of law students’ attention. When evaluated through the moral lens of jurors’
deliberative autonomy, it also is the exclusionary rule that is the hardest to justify.

There is no question that hearsay can provide the basis for rational choices.
Indeed, we routinely rely on hearsay in our daily lives, on matters both large and small.
We build religions, for example, on others’ accounts of what influential figures
purportedly taught. The student who misses a class will rely on classmates’ notes or oral
summaries when trying to find out what the professor said in his or her absence. We
make hiring decisions based on applicants’ letters of recommendation. We seek out or
avoid restaurants, books, television programs, movies, and vacation destinations based on
the experiences that we hear others have had. It likely is not going too far to say that a
person who wholly refused to rely on hearsay would find it impossible to be a happy,
well-adjusted member of society.

So long as they pass the test for determining relevancy, therefore, hearsay
statements are undoubtedly among the items of evidence that a rational juror would want
to consider when trying to ascertain the facts of a case. Left to their own devices, jurors
would “follow a method of fact-finding with which they are familiar—a method, that is,
in which the treatment of evidentiary material deviates as little as possible from
conventions and strategies used in ordinary life and personal affairs.” Because jurors
are accustomed to using and evaluating hearsay when making daily decisions, there is no
reason to believe that they would willingly shut their ears to relevant hearsay in the

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191 Authors of evidence casebooks, for example, commonly devote between twenty and thirty
percent of their pages to the hearsay ban and its many exceptions. See, e.g., KENNETH S. BROUN ET AL.,
EVIDENCE: CASES AND MATERIALS (6th ed. 2002) (devoting approximately one-quarter of the text to
hearsay); OLIN GUY WELLBORN III, CASES AND MATERIALS ON THE RULES OF EVIDENCE (4th ed. 2007)
(devoting nearly one-third of the text to hearsay). See generally FED. R. EVID. 802 (“Hearsay is not
admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to
statutory authority or by Act of Congress.”); id. 801(c) (“‘Hearsay’ is a statement, other than one made by
the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter
asserted.”).

192 See FRANK, supra note 9, at 123 (“Now doubtless hearsay should be accepted with caution.
But 90% of the evidence on which men act out of court, most of the data on which business and industry
daily rely, consists of the equivalent of hearsay.”).

193 See supra note 170 (stating the test for determining relevancy).

194 DAMAŠKA, supra note 3, at 27.
courtroom. Concealing relevant, readily available hearsay thus infringes upon jurors’ deliberative autonomy. 195

As I parenthetically indicated earlier, 196 lawmakers attempt to justify the concealment of relevant hearsay by arguing that jurors would likely give those statements more weight than they rationally deserve. Specifically, lawmakers believe that jurors would overestimate the reliability of statements that were not made when the declarant was under oath, in the jurors’ presence, and subject to immediate cross-examination. 197 Believing that certain kinds of hearsay are more likely to be reliable than others, however, the rules’ drafters have defined a number of exceptions to the hearsay ban, anticipating that if jurors place great weight upon statements that fall within one of those exceptions, the jury’s reliance is unlikely to be misplaced. 198

To show proper regard for jurors’ autonomy, defenders of the hearsay rule must demonstrate that irrationally overestimating the reliability of hearsay statements is a problem so endemic that, to ensure accurate verdicts, all hearsay statements must be banned from the courtroom unless they fall within a prescribed exception. That is a daunting hurdle that the hearsay rule’s champions are unlikely to clear. 199 As Learned Hand observed, jurors’ daily experience with the benefits and pitfalls of relying on hearsay ought to prepare them quite well for treating hearsay with the appropriate degree

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195 See supra notes 108-33 and accompanying text (discussing jurors’ autonomy and its evidentiary implications).
196 See supra note 157 and accompanying text.
197 Jack Weinstein and Margaret Berger explain:

> The trier of fact is less likely to reach a correct conclusion with respect to the credibility of the out-of-court declarant if the trier cannot observe the declarant making the statement when he or she is (1) under oath and the stress of a judicial hearing, (2) being observed by an adverse party, and (3) subject to almost immediate cross-examination to test the various elements of the declarant’s credibility. The hearsay rule is directed against the danger that evidence which is not subject to these three conditions will be less reliable, and less likely to be properly evaluated by the trier, because faults—or strengths—in the declarant’s perception, memory, and narration will not be exposed.


198 See FED. R. EVID. 801(d)(1) (excluding certain prior statements by witnesses from the definition of hearsay); id. 803 (identifying exceptions that apply regardless of the declarant’s availability to testify); id. 804 (identifying exceptions that apply only if the declarant is unavailable to testify); id. 807 (identifying the requirements of the residual exception); see also WEINSTEIN & BERGER, supra note 197, § 14.01[2] (“The drafters of the Federal Rules . . . believed that the hearsay rule does serve to exclude evidence too unreliable to be evaluated accurately be the trier of fact. They also concluded, however, that under the traditional scheme, evidence of high probative value is too often excluded.”).

199 See Landsman, supra note 5, at 76 & n.48 (citing numerous studies that indicate “that jurors handle at least some sorts of hearsay with thoughtfulness and care”). In this Article, I do not discuss related issues concerning the morality of the Confrontation Clause. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”).
of skepticism in the courtroom. To the extent that a gap does sometimes exist between individuals’ natural skepticism about hearsay and the degree of skepticism that lawmakers believe is warranted when assigning criminal guilt or civil liability, it ordinarily should be possible to bridge that gap with cautionary guidance from the court about hearsay’s specific dangers, together with cautionary arguments by the party who stands to be harmed if the evidence is given great weight.

Moreover, the fact that a litigant’s evidence takes the form of hearsay does not itself suggest that the litigant is seeking to instrumentalize jurors by placing them under the influence of overpowering non-rational influences. Hearsay statements, as a class, are not aimed at violating jurors’ autonomy by provoking them to reach a verdict before they have had a fair opportunity to use their rational capacities. Nor is proffering hearsay necessarily akin to Kant’s deceitful promise, seeking to take advantage of how jurors will behave in the absence of information known to the evidence’s proponent. Concealing relevant, readily available hearsay, therefore, cannot be broadly justified in the name of protecting jurors’ autonomy.

Once one takes jurors’ autonomy appropriately into account, it becomes apparent that our current treatment of hearsay is exactly backward. Today, we apply a default rule that violates jurors’ autonomy by concealing all relevant hearsay statements, making exceptions only when we believe that jurors’ reliance on those statements would be well placed. The moral entitlements that accompany jurors’ autonomy demand that we instead apply a default rule that admits all relevant hearsay statements—perhaps with cautionary instructions from the court concerning the dangers of too readily deeming hearsay reliable—and that we exclude relevant hearsay only when we reasonably believe that there is an unacceptably high risk that, even with the court’s cautionary guidance and even with the cautionary arguments of the evidence’s opponent, the jury would irrationally overestimate the statements’ reliability. Rather than generally ban hearsay unless it falls within an exception, in other words, we should generally permit hearsay

200 See Hand, supra note 10, at 100 (arguing that we should trust jurors to treat relevant hearsay statements with appropriate skepticism); see also id. at 101 (“[I]f we trust [jurors] at all, can we hope to obtain satisfactory results when we deprive them of the kind of proof to which they would have recourse in every other inquiry they undertake?”); David Crump, The Case for Selective Abolition of the Rules of Evidence, 35 HOFSTRA L. REV. 585, 610 (2006) (asserting that jurors are capable of detecting and evaluating the risks presented by hearsay evidence).

201 See Crump, supra note 200, at 616 (offering a proposed instruction aimed at arming jurors to evaluate the risks presented by hearsay evidence, but stating that such an instruction is likely unnecessary because jurors either will detect those risks on their own or will be urged by opposing counsel to consider those risks); cf. Strier, supra note 9, at 123 (proposing that, rather than rely heavily on exclusionary rules, we should instead ask judges to caution jurors about the dangers of particular kinds of evidence).

202 See supra notes 162-64, 172-78 and accompanying text (discussing such efforts to instrumentalize others).

203 See supra notes 162-64, 172-78 and accompanying text (discussing this potential justification for restricting speech).

204 See supra notes 83, 105-06 and accompanying text (discussing Kant’s deceitful-promise example).
and focus our exception-drafting energies on identifying those circumstances in which the risk of irrational over-reliance seems particularly great.

d. Character Evidence

Suppose that the prosecutor in an assault case wishes to introduce testimony concerning the defendant’s prior heinous conduct in circumstances that are unrelated to the assault with which the defendant has been charged. The prosecutor’s argument for admission is that the defendant’s prior conduct revealed violent character traits that make it more likely that the defendant committed the charged assault. Let us assume, as the common law assumed and as the rules of evidence continue to assume today, that evidence of character traits can have legitimate probative value when offered to prove how a person behaved on a particular occasion. Rules 404 and 405 of the Federal Rules of Evidence nevertheless prevent the prosecutor from pursuing this evidentiary strategy.

One rationale for banning the prosecutor’s evidence is that jurors might give it more probative weight than they rationally should, believing that individuals behave in accordance with previously manifested character traits far more invariably than they actually do. Studies do indeed suggest that “people tend to overestimate the predictive value of [prior] behavior.” Yet there is good reason to believe that the danger of over-relying on character evidence is a subject on which jurors would be readily educable, and that any tendency to give character evidence too much weight thus could be corrected with cautionary guidance from the court and with arguments from the party who would be harmed if the jury accorded the evidence great significance. Just as jurors have daily


206 See, e.g., FED. R. EVID. 404(a) (authorizing the admission of character evidence, in a limited range of circumstances, to prove how a person behaved on a particular occasion); id. 608 (authorizing limited forms of evidence concerning a witness’s character for truthfulness); id. 609 (same).

207 Scholars sometimes debate the relevance of character evidence. See FED. R. EVID. 404 advisory committee’s note (“This circumstantial use of character evidence raises questions of relevancy . . . .”); Mendez, supra note 205, at 1052 (arguing that character evidence lacks strong probative value because small differences in circumstances can lead a person to behave differently on different occasions); cf. Deborah L. Rhode, Moral Character as a Professional Credential, 94 YALE L.J. 491, 557 (1985) (“Over the past half century, a vast array of social science research has failed to find evidence of consistent character traits.”). If character evidence is irrelevant when offered to prove how a person behaved on a particular occasion, then a rational person would not want to consider it and it thus should be excluded.

208 See FED. R. EVID. 404(a) (stating the general rule that “[e]vidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion”); id. 405(a) (stating that, even when character evidence is admissible, evidence of specific acts of conduct is generally not admissible on direct examination). But cf. 405(b) (allowing proof of character by specific acts of conduct when “character or a trait of character of a person is an essential element of a charge, claim or defense”).

209 Mendez, supra note 205, at 1043.
experience with the benefits and pitfalls of relying on hearsay, so too do they have daily experience with the benefits and pitfalls of predicting other people’s behavior—or of having their own behavior predicted by others—based on previously expressed character traits. Those experiences give courts and attorneys a promising background against which to sensitize jurors to the risks of jumping to character-driven conclusions too quickly. If lawmakers fear that jurors might ascribe too much significance to character evidence, therefore, the morally appropriate solution is not to infringe upon jurors’ autonomy by concealing the evidence altogether, but rather to emphasize to the jury the reasons for handling relevant character evidence with particular care. Fears of irrationality can morally justify withholding relevant character evidence only in those instances in which we reasonably believe that, even with clear guidance from the court and with arguments from opposing counsel, jurors would irrationally give the evidence too much weight.

Even if lawmakers do not believe that jurors would give character evidence more weight than they rationally should, Thomas Scanlon’s analysis of autonomy suggests that barring the evidence still might be morally permissible. Scanlon argues that honoring decision-makers’ autonomy is an important value that sometimes must be traded against the costs of allowing individuals to make choices that could result in significant harm, even when the decision-makers’ rational capacities are not compromised. Again, it is on the strength of this reasoning that Scanlon believes it is morally permissible for the government to ban television advertisements for tobacco products.

In our hypothetical assault case, the prosecutor’s character evidence might cause even cool-headed, fully rational jurors to find the defendant guilty, regardless of whether they believe the defendant committed the assault for which he is on trial. Such a decision would be legally condemnable, but that does not mean that it would be irrational. The jury’s decision in such a case might well be the rational product of the belief that society would be safer if the defendant were incarcerated, or that principles of natural justice would be served if the defendant were punished for his prior despicable conduct. The problem in that instance thus would lie not with jurors’ degraded rational capacities, but rather with the reasons on which jurors chose to base their verdict. Even when jurors’ rational capacities are not diminished, therefore, the moral imperative of avoiding wrongful convictions can outweigh the moral imperative of respecting jurors’ decision-making autonomy.

210 See supra notes 200-01 and accompanying text.

211 Cf. Bentham, supra note 1, at 12-15 (making a comparable argument regarding England’s then-existing competency rules); Strier, supra note 9, at 123 (proposing that, rather than rely heavily on exclusionary rules, we should instead ask judges to caution jurors about the dangers of particular kinds of evidence).

212 See supra notes 165-68 and accompanying text (discussing Scanlon’s argument).

213 See Scanlon, supra note 165, at 532.

214 See id.
Scanlon’s argument does not, however, warrant a character-evidence ban that is as broadly sweeping as the one we currently employ. There might be occasions, such as in our hypothetical example involving past conduct that is especially heinous, when concealing the evidence would indeed be justified by the need to ensure accurate verdicts. But that is a far cry from demonstrating that, with the limited exceptions currently authorized by Rule 404(a), character evidence should always be inadmissible as circumstantial proof of how a person behaved on a particular occasion. Under the existing rules, character evidence is admissible in civil cases only when used to attack the credibility of witnesses, and is admissible in criminal cases in only a slightly broader range of circumstances. There is no reason to believe that, even with cautionary guidance from the court, character evidence invariably strongly tempts jurors to issue verdicts that do not reflect their analysis of the charges or claims that are properly before them. If the relevant character evidence offered in a particular case would neither produce poorly reasoned verdicts nor strongly tempt jurors to disregard the law and the court’s instructions, then it impermissibly violates jurors’ deliberative autonomy to conceal it from them.

CONCLUSION

The law today offers citizens two radically different mirrors in which to see how others have judged their rational capacities and their corresponding moral entitlements. If a citizen looks at herself through the eyes of the First Amendment’s guarantee of the freedom of speech, she will find that, except in extraordinary circumstances, she is presumed to be a rational person who is capable of sifting through complex tangles of conflicting claims, who can be trusted to make judgments of grave consequence, and who is morally entitled to distinguish for herself between the true and the false, the reliable and the unreliable, and the significant and the insignificant. If the citizen looks instead into the mirror offered by the ban on evidence believed to present a significant risk of unfair prejudice, the ban on hearsay, and the ban on character evidence when offered to prove how a person behaved on a particular occasion, she will find that the picture is starkly different. Once she enters the jury box and the fate of another person’s life, liberty, or property has been placed in her hands, she often is presumed to be a person who is irrational and prone to emotion overreaction, who cannot be trusted to handle relevant information in an intellectually responsible manner, and who has no moral right to see and hear all of the readily available evidence that a rational person would consider before making a significant decision.

215 Rule 404(a) identifies three narrow categories of character evidence that may be admitted as circumstantial proof of how a person behaved on a particular occasion: (1) certain evidence regarding the alleged victim of a crime; (2) certain evidence regarding the criminal defendant’s character, if the defendant opens the door for such proof by offering evidence regarding either his own character or the alleged victim’s character or if the defendant argues in a homicide case “that the alleged victim was the first aggressor;” and (3) certain evidence regarding the character of witnesses. See Fed. R. Evid. 404(a).

216 See supra note 215 (briefly summarizing the provisions of Rule 404(a)).

217 See supra notes 31-79 and accompanying text (describing the historical emergence of exclusionary rules).
The fact that citizens’ rational capacities and moral entitlements might be differently appraised in different settings is not itself surprising. What is surprising is the extent to which the legal profession has quietly exempted its long-standing exclusionary rules from moral scrutiny. Such scrutiny reveals that some of the most commonly applied exclusionary rules are indeed deeply problematic.

As Kant argued more than two centuries ago, all competent adults have the moral right to be treated as autonomous beings who are sovereign with respect to the use of their own rational capacities and who cannot be treated merely as a means to others’ ends. Forcing jurors to make decisions based upon a limited, government-screened body of evidence violates jurors’ deliberative autonomy and instrumentalizes them in service to the government’s and the litigants’ objectives. Two factors render this infringement especially troubling. First, jury service is a central component of the American system of self-government, and citizens have a powerful moral interest in securing the decision-making information they need in order to govern themselves. Second, the exclusionary rules concerning hearsay, character evidence, and evidence posing a risk of unfair prejudice are all based squarely upon lawmakers’ doubts regarding citizens’ capacity to reason, the very wellspring of citizens’ moral right not to be instrumentalized.

Of course, the government is not morally obliged to ignore the fact that jurors do sometimes behave irrationally and that litigants can be harmed as a result. Exclusionary rules find their most secure moral footing when they are invoked to conceal relevant evidence that would (a) violate jurors’ autonomy by provoking them to render a verdict before they have rationally evaluated all of the evidence that the litigants have presented; (b) trigger an irrational response, despite the court’s best efforts to educate jurors about the risks that the evidence presents; or (c) strongly tempt jurors to render a verdict that, although rational, is based upon reasons that the law condemns. Far too often, however, exclusionary rules operate to conceal relevant, readily available evidence when none of those risks is genuinely present or when those risks could be satisfactorily addressed by admitting the evidence with cautionary guidance from the court. In short, we could do a far better job of simultaneously ensuring litigants of rational outcomes and properly honoring jurors’ deliberative autonomy. So long as we compel citizens to serve on juries, we are morally obliged to do no less.

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218 See supra notes 80-93 (discussing autonomy-based moral rights).
219 See supra notes 134-52 (discussing the strength of autonomy-based rights in the realm of self-government).
220 See supra notes 153-59 (making this argument).
221 See supra notes 162-216 (making these arguments).
222 See supra notes 162-216 (making these arguments).
223 See supra notes 94-98 (noting the compulsory nature of jury service).