1992

Teaching Evidence: Storytelling in the Classroom

Beryl Blaustone
CUNY School of Law

How does access to this work benefit you? Let us know!
Follow this and additional works at: http://academicworks.cuny.edu/cl_pubs
Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the CUNY School of Law at CUNY Academic Works. It has been accepted for inclusion in Publications and Research by an authorized administrator of CUNY Academic Works. For more information, please contact AcademicWorks@cuny.edu.
TEACHING EVIDENCE: STORYTELLING IN THE CLASSROOM

Beryl Blaustone*

TABLE OF CONTENTS

Introduction ................................................ 453
I. Teaching Evidence: Narratives on the Life of John Henry Wigmore ........................................... 456
   A. Narrative One: Relevancy and Its Limits .......... 460
   B. Narrative Two: Privileged Communications and the Attorney’s Work Product Protection .......... 465
   C. Narrative Three: Refreshing Memory, Authentication, and Witness Competency ............... 470
   D. Narrative Four: Lay Witness Opinion and Expert Testimony ........................................... 476
II. Creating Short Stories: A Framework for Other Storytellers ............................................ 482
III. Student Responses to Storytelling ...................... 483

INTRODUCTION

Narrative in the law is far from novel.¹ Narrative as a teaching

---

¹ Assistant Law Professor, CUNY Law School at Queens College; B.A. University of Minnesota, 1971; J.D. Antioch School of Law, 1975. I am indebted to my colleagues Peter Margulies, John Delaney, Susan Bryant, Kandis Scott, and Kerr Kreiling for their helpful suggestions in writing this Article. I am grateful to my principal research assistant on this project, Pius Bannis, for his extensive research contributions. In addition, I thank Nick Kambolis, research assistant, for his valuable contributions to the production of this piece and Jeffrey Cohan, research assistant, for his help.


Feminist theory focuses on the differences between the lives of women and the lives of “human beings” assumed under general legal theory. West, supra, at 42. Legal theory concentrates on the individual and questions of autonomy. In comparison, feminist theory is
device in education is likewise not a recent invention. By contrast, the use of narrative in legal instruction is both novel and innovative.

Storytelling is a useful pedagogical tool in the law school classroom. In this Article, I discuss my use of short stories as a review device for the basic rationales 3 encompassed within the Federal Rules of Evidence (Federal Rules). In doing so, relevant portions of the scholarly literature on "learning theory" regarding the use of narratives in instruction are explained. I also discuss how story-

centered with community and connection. Id. at 14 (explaining "connection thesis" which finds difference between lives of women and men in that women are "actually or potentially materially connected to other human life"); id. at 42 (discussing feminist theory critique of legal assumption of individuation and autonomy which excludes values of women); id. at 65 (citing need to focus on stories about women to highlight legal exclusion of values of intimacy and nurturing). Narrative allows feminist legal scholars to illustrate how law recognizes only male standards and excludes the values and concerns of women. Id. at 63-65. The goal of this tactic is to change the law to recognize a distinct female voice. See Estrich, Rape, 95 YALE L.J. 1087, 1112-15 (1986) (discussing facts of rape case and requirement that victim's fear be judged reasonable under male standard).

Racial minorities have also used narrative to "change the terms of the debate" and bring their voice into legal scholarship. Culp, supra, at 545. Critical race theory attempts to incorporate personal anecdotes of minorities into legal discussion to emphasize that legal theory is not neutral, but rather necessarily espouses a particular viewpoint. Id. at 546-50. For example, presenting a black perspective in legal teaching allows black students to identify with the subject matter and informs nonblack students of other possible analytical viewpoints. Id. at 553-54.

Clinical legal education goes one step further and places the student directly into a narrative where each choice affects a client. De Benedictis, supra, at 57. Emphasis on educational reform and public interest law means that students in clinic have direct contact with indigent clients for perhaps the only time in their careers. Id. at 55, 58. Clinical education merges method and subject to teach responsibility and develop skills through immersion in the facts of a particular case. Id. at 57.


My focus on the use of narrative as a review technique was not a subject of discussion in any of the aforementioned articles. Narrative has, nevertheless, been used in law school courses as a method promoting reflection on assigned readings. See Bell, Higgins & Suh, Racial Reflections: Dialogues in the Direction of Liberation, 37 UCLA L. Rev. 1037, 1041-42 (1990) (concerning required weekly written reflection on assigned readings in civil rights class); Johnson & Scales, An Absolutely, Positively True Story: Seven Reasons Why We Sing, 16 N.M.L. Rev. 433, 435 (1986) (concerning authors' extensive use of narrative, dialogue, and verses of songs in teaching jurisprudence to communicate vision of law as human drama and as potential liberation of creativity).

3. Rationale, in this context, refers to the underlying reasons or the controlling principles for the existence of a particular rule of evidence.

telling in the law school classroom is part of the recent emergence of the use of narrative in legal scholarship. This scholarship integrates an understanding of the human condition with the experience of law. In a similar vein, my storytelling is based on an understanding of the human learning process and a desire that students understand the human dimension in the existence and perpetuation of law.

Storytelling is an antidote to students’ reliance on an over-restrictive form of legal positivism by which students mechanically memo-

new methods for secondary school teaching that help students go beyond limits of linear thinking and incorporate theory and practice in various modes of learning; C. Rose, ACCELERATED LEARNING (1985) (discussing accelerated learning techniques that reject memorization in favor of using power of association to employ conscious and subconscious thought simultaneously in learning process). I use the term “learning theory” to refer to the bodies of scholarly literature in the fields of psychology and education that examine the mental functions used in the learning process. See P. Kline, supra, at 19 (stating that recent literature on learning theory focuses on ways to match teaching to brain’s functioning by moving away from traditional educational environments and methods). This discipline is also referred to as “integrated learning,” “accelerated learning,” “optimal learning,” “superlearning,” “whole brain learning,” and “holistic learning.” Id.

5. See Blaustone, To Be of Service: The Lawyer’s Aware Use of the Human Skills Associated with the Perceptive Self, 15 J. LEGAL PROF. 241, 245-56 (1991) (using fictional dialogue to introduce theory that fundamental human skills play more important roles in successful lawyering than recognized in traditional legal thought). I tend to instruct and write with heavy emphasis on the narrative. I use exercises and role-playing extensively in classroom instruction. This is the result of my study of learning theory and my individual predilection to conceptualize with metaphor and narrative. Significantly, Alasdair MacIntyre used storytelling to begin his examination of moral theory. See A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 1-2 (1981) (using storytelling as backdrop for setting out basic structure and content of argument on moral philosophy). MacIntyre places the reader in an imaginary time of environmental disaster where the natural sciences are destroyed. Id. at 1. The remnants of scientific knowledge, even though devoid of value standing alone, are blindly embraced by the few enlightened souls. Id. Within this make-believe scenario, MacIntyre sets forth the basic structure and content of his argument on moral philosophy. In addition, writers in law have also used narrative in developing their philosophical and theoretical positions. See J. SAMMONS, LAWYER PROFESSIONALISM xi-xiii (1988) (employing dialogue to provoke critique of role of ethics in law); Gabel & Kennedy, Roll Over Beethoven, 36 STAN. L. REV. i, ii (1984) (using dialogue to present different philosophical perspectives within critical legal studies regarding value of “traditional philosophical discourse”).


7. I use “legal positivism” to refer to the isolated structural analysis of legal rules divorced from circumstances and influences. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977) (defining legal positivism as set of legal rules, divorced from social or moral rules, which govern all aspects of law); K. LEE, THE POSITIVIST SCIENCE OF LAW 3-4 (1989) (stating that legal positivist theorists deny any connection between law and morality).
rize and regurgitate rules without understanding the purpose or context of the law. Storytelling does not validate the myth of "objective analysis," the assumption that doctrine is the basic unit of analysis for reality. Rather, storytelling demonstrates that human experience is the wellspring for the development of law. When the policy reasons or the underlying purposes of the rules are articulated, structure and meaning are given to the rules. Thus, storytelling contextualizes the rules in ways that show that, in reality, facts are value-filled\textsuperscript{8} and not value-neutral.

I. Teaching Evidence: Narratives on the Life of John Henry Wigmore

The full text of four review narratives based on the life of John Henry Wigmore appear in this Article, along with detailed annotations to his treatise, \textit{Evidence in Trials at Common Law}.\textsuperscript{9} The annotations are provided to indicate consistency with or divergence from, Wigmore's commentary. Divergence occurs where necessary to conform the content of the short story to the Federal Rules of Evidence. Further, the annotations instruct the reader as to how I constructed the story to conform with my teaching objectives.

I use the life of John Henry Wigmore as the setting for my review narratives.\textsuperscript{10} I choose to acquaint students with Wigmore, as evidence scholar, because of his authoritative contributions to this body of doctrine. Wigmore is commonly regarded as the greatest thinker in world history on evidence doctrine.\textsuperscript{11} His treatise is used worldwide as an authoritative text on the development of the com-

\begin{itemize}
\item \textsuperscript{8} The term "value-filled" illustrates the influence of perception and predilection on the identification and development of selected aspects of experience. These selected aspects of experience are named "facts." See P. MacLean, \textit{On the Evolution of Three Mentalities}, in \textit{2 New Dimensions in Psychiatry: A Worldview} 305, 310 (1977) (asserting facts are not valid in abstract but rather derive validity from subjective "public assessment").
\item \textsuperscript{9} J. Wigmore, \textit{Evidence in Trials at Common Law} (J.H. Chadbourn rev. 1979). When reading the text of the review narratives, the reader should bear in mind that these stories were written with a concern for easy listening. The design, structure, and expression are geared for oral communication. The reader may, therefore, experience the short stories differently than a listener would experience them. As a listener, the student is part of an audience sharing a common experience, about which there can be discussion and application.
\item \textsuperscript{10} I also refer to my short stories as "review narratives."
\item \textsuperscript{11} At this point in history, judicial notice of this fact could take place in most courtrooms. Most commentators acknowledge the outstanding role of Wigmore in writing his treatise. See, e.g., McCormick, \textit{Wigmore, Nation's Greatest Legal Scholar}, \textit{Pases}, 6 Tex. B.J. 154, 154 (1943) (stating that Wigmore's treatise is "without question the greatest of Anglo-American law treatises of all time" and that Wigmore was greatest American legal scholar of his generation); Kocourek, \textit{John, Henry Wigmore—1863-1943}, 29 A.B.A. J. 316, 316 (1943) (describing Wigmore's treatise as "one of the greatest intellectual feats in law-writing of any age or of any country"); Rutledge, \textit{Two Heroes of the Law}, 29 A.B.A. J. 425, 425 (1943) (stating Wigmore's work "stands preeminent among the greatest produced by American legal scholarship").
\end{itemize}
mon law of evidence. Wigmore, a professor and dean at Northwestern University School of Law in Illinois, was a prolific author of many scholarly legal works, including tremendous contributions to international law. In addition, Wigmore served on many high commissions and committees that set policy and revised the law. He died in 1943.

I created the short stories to reflect real events in Wigmore's life, which I changed when necessary to reinforce the students' understanding of the Federal Rules of Evidence. I kept as close as possible to actual events and biographical data in order to set the context for the story. I then fashioned a fictional story within this context in order to accomplish the review of the specific doctrine.

In the short stories, my intention was to keep Wigmore's perspective on the specific doctrines. Because my primary learning objective was to review the rationale of the Federal Rules of Evidence, however, I focused on the current prevailing legal interpretation of

13. See W. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 32-75 (1977) (discussing writings by Wigmore in fields of torts, criminal law, evidence, comparative law, and negligence); id. at 166 (stating Wigmore wrote casebooks on torts and evidence that he used in his teaching); id. at 250-64 (describing Wigmore's efforts to foster international cooperation including active support for League of Nations and International Court of Justice and works published from articles to multi-volume books).
14. See id. at 220-25 (discussing membership to American Bar Association committees including Joint Committee on Improvement of Criminal Justice, Special Committee on Improvement of Procedure in Trials of Rate and Public Utility Cases, Committee on Development of International Law Through International Conferences, Special Committee on Coordination of State and Local Bar Associations, Criminal Law Section's Committee on Courts and Wartime Social Protection); id. at 221 (stating Wigmore was chairman of American Bar Association's Section on Improvement in Law of Evidence); id. at 225 (citing Wigmore's membership to American Institute of Criminal Law and Criminology); id. at 226 (describing Wigmore's involvement with American Law Institute, including membership to Advisory Committee on International Justice, consultation on American Law Institute's Code of Evidence, and service on National Conference of Commissioners on Uniform State Laws).
16. For each short story that follows, I will indicate which facts are biographically accurate and which are fictional.
the Federal Rules.\textsuperscript{18} I styled the stories to place the students in Wigmore's mind at the moments he was conceptualizing the rationales for various rules of evidence. My purpose in using this format was to have students experience the formulation of underlying reasoning for the rules as an understandable mental process. Thus, I intended to demystify the legal reasoning process for the students.

The student's experience with storytelling should be pleasant and effortless. The story should cover the rationale and review the nomenclature of the doctrine, while flowing smoothly to hold the listener's interest in the plot. In other words, the experience should be the same as listening to a story that has captured one's attention.\textsuperscript{19} This perspective on narrative was the catalyst for my decision to use Wigmore's life as the setting for the stories. Students would be more attentive because this man's history comes to life. I also wanted the stories to convey the reality that the creation of legal rationale is a product of life experience. In using the life of Wigmore, I sought to combine all of these objectives.

My storytelling was intended as a review and recall device in anticipation of detailed testing on the evidential concepts through multiple choice questions. Theoretically, the use of narrative in instruction or self-study is intended to ease information into the students' long-term memory. This is accomplished by reviewing the rational connections within, and the overall structure of, the particular doctrines.\textsuperscript{20} In other words, storytelling is intended to assist stu-
students in their ability to understand, store, and later retrieve information from their memory.

In addition to the careful structure of the narratives, I attempted to apply the narrative in a manner that encouraged student learning. To overcome students' potential resistance to this novel teaching technique, I limited review narratives to no longer than eight or ten minutes each. Plus, during the sixteen weeks of instruction, the four review narratives I read totaled no more than forty minutes of class time.

At the end of a unit of my syllabus covering a portion of doctrine, I read the students a short story as part of my review class on the covered doctrine. These review sessions contain two components.

recreated by promoting curiosity and by overlaying several different modes of stimulation in understanding any matter. G. LOZANOv, SUGGESTOLOGY AND OUTLINES OF SUGGESTOPEDEY 5 (1979).

Dr. Lozanov's theory states that students will learn more with less required concentration if the learning environment is relaxed in a way that stimulates both linear thinking and imagination. C. Rose, ACCELERATED LEARNING 2, 11 (1985). Linear thinking and imagination complement each other and, if the two are used together, lead to increased "potential of the brain for learning and creativity." Id. at 13-14. To achieve integrated learning in the classroom, lessons must be presented in context. This requires using realistic characters and everyday experiences in teaching to stimulate the students' visualization. P. Kline, supra note 4, at 224-25. With logic and emotion working together, greater association allows for improved recall. Id. at 180-81.

In the United States, there are a number of scholars engaged in using, extending, and amending this basic theory of an integrated use of the self in the learning process. Among these individuals are: Dr. Peter Kline, a former trainer at the Lozanov Learning Institute in Washington and author of EVERYDAY GENIUS: RESTORING CHILDREN'S JOY OF LEARNING—AND YOURS TOO, supra note 4; Dr. James Quina, author of EFFECTIVE SECONDARY TEACHING: GOING BEYOND THE BELL CURVE, supra note 4; and Dr. Ivan Barzakov, from the Barzak Educational Institute. For popular literature applying learning theory to such specific tasks as writing and drawing, see generally G. Rico, WRITING THE NATURAL WAY: USING RIGHT-BRAIN TECHNIQUES TO RELEASE YOUR EXPRESSIONS POWERS (1983) (applying learning theory to writing); and B. Edwards, DRAWING ON THE RIGHT SIDE OF THE BRAIN (1979) (applying learning theory to drawing).

In perceptual research, Dr. Paul MacLean developed the model of the triune brain as a schema for achieving full human potential in any task. See generally MacLean, supra note 8, at 313 (asserting that, to function completely in creative tasks, one must jointly use parts of brain responsible for intellectual activity and parts responsible for feeling and emotion). Achieving full human potential is possible when both the neo-cortex and the limbic system are engaged in the activity. Id. at 317-18. The third part of the triune brain controls involuntary and lower order functions. Id. at 319.

21. I confine the use of storytelling to the review process. Storytelling is also commonly used, however, as an introductory device to establish a general overview of the subject matter prior to a more specific, in-depth study. Because I was cautious, as well as conservative, regarding my students' acceptance of new teaching methods, I decided that it was a less abrupt shift in learning style to use storytelling only as a small part of review. I thus exclude narrative as a means of introducing segments of evidence doctrine. My reasoning for this exclusion was that the students' anxiety regarding new material would increase the likelihood of impatience with a method distinct from traditional lecture, Socratic discussion, problem solving, and note taking.

22. My course, Lawyering and the Public Interest (LAPI I), is the first semester of a two semester course that includes exposure to alternative dispute resolution, mediation, introduction to trial practice, and evidence. The evidence coverage is divided between two semesters.
First, I read aloud the short story. Students are asked to relax and not to take notes.\(^2\) No immediate discussion follows the storytelling. Rather, questions and comments occur later in the class or in a future class. Immediately following the review narrative, I give multiple choice review questions covering in detail the doctrine in the particular section of the course. These questions are given under exam conditions and, afterward, the class discusses both the correct and incorrect answers. I use this review format to prepare students for my multiple choice final examination in Evidence, as well as to expose them to MultiState Bar Examination conditions.

The text of the four short stories used in my review sessions follows this introduction. Afterwards, I discuss my observations on their value as a device for learning evidence.

A. Narrative One: Relevancy and Its Limits

The Federal Rules of Evidence govern proceedings before the courts of the United States and United States Magistrates.\(^2\) The following short story concerns the general concept of relevancy\(^2\) and the Federal Rules that affect the admission of relevant evidence.\(^2\) More specifically, the narrative focuses on the exclusion of relevant evidence on the basis of prejudice, confusion, or unnecessary delay;\(^2\) the general inadmissibility of character evidence to prove the likelihood of conduct;\(^2\) and subsequent remedial measures.\(^2\) Finally, the story incorporates the policy objectives underlying compromises and offers of compromise between parties.\(^3\)

John Henry Wigmore is eight years old, quite a precocious lad and of good parentage.\(^3\) We find him attending his third day of

---

Generally speaking, the first semester includes all the rules of evidence except reliability issues, hearsay, and impeachment, which are fully covered in the second semester.

There are approximately 150 students enrolled in LAPI I. I teach my evidence classes twice a week. At the beginning of the week, I usually teach the class twice in groups of approximately 75 students. Dividing the class into two sections permits more classroom participation and a smaller, more effective, group dynamic. At the end of the week, I teach one class to all 150 students. Regular classroom instruction leading up to the review sessions includes the Socratic method, lecture, case analysis, and the use of problems.

23. Integrative learning theory stresses the need to relax in order to improve learning. See P. Kline, supra note 4, at 72 (emphasizing that traditional classroom setting produces negative tensions that cause students to "downshift" and respond automatically rather than using intellect).

27. Fed. R. Evid. 403.
30. Fed. R. Evid. 408.
31. There is more to Wigmore than his contributions to law. Race, gender, and class undeniably influenced how he perceived the universe in the early part of the twentieth century. To a degree, these factors must have influenced his theoretical, ideological, and ethical
classes in a new private school. John Henry is agitated. The boys teased him outside on the playground before class this morning. He is now seated in his classroom to begin the day. At least he thinks he likes his new teacher, yesterday she accompanied him to the room and was nice.

Now, a man suddenly comes into the classroom and announces, "John Henry Wigmore, where are you? You are to come with me! You are in the wrong classroom! I'm supposed to be your teacher!" This man terrified little John Henry and was more than John Henry could bear. John Henry clung to the legs of his desk and would not let go. Out of terror, he wrapped himself around his desk. The teacher came over and started to tug. The teacher tugged and tugged at John Henry, but John Henry would not let go. Instead, John Henry held on tighter and tighter. For the moment, the teacher gave up, and all the children were dismissed for lunch.

John Henry's parents were outraged at the psychological damage done to their precious child, in addition to the scrapes and bruises the teacher inflicted. The Wignores sued the school and teacher for civil assault, battery, and negligence in the school's operations, that is, a lack of care in admitting new students.

The school was horrified at the extremity of the Wignores' reactions. First, the school authorities saw no connection between the erroneous assignment to the wrong classroom and the subsequent actions of the teacher. These two facts were wholly separate from one another. The error in room assignment really sheds no light on approaches to evidence. As a result of my short stories, I have received undocumented reports of Wigmore's anti-woman bias. These short stories are not intended to justify John Henry Wigmore's biases, value system, or social class. The primary goals of the C.U.N.Y. curriculum are to promote diversity of perspectives and greater inclusion of underrepresented peoples into the legal profession.

32. Although Wigmore did suffer the indignity of the assault described in this story on the third day of attending a new school, in actuality this was John Henry's first exposure to public school. I have altered the facts of this story. Most notably, I changed the scenario from the actual site of the event to a private school. This change was necessitated to permit litigation against the school in the short story without reference to issues of sovereign immunity. Also, the actual assailant was the superintendent and not a classroom teacher. In addition, the facts other than the mere occurrence of the assault are made up. The short story's entire exploration of litigation by the Wignores and their subsequent interaction with the school authorities are entirely fictional. In actuality, after Wigmore's traumatic third day in public school, his mother transferred John Henry into the Urban Academy, a prestigious private school where he did quite well. For a description of the actual occurrence, see generally Roalf, _John Henry Wigmore—Scholar and Reformer_, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 277, 297 (1962); W. ROALFE, _JOHN HENRY WIGMORE: SCHOLAR AND REFORMER_ 3 (1977). The reader will note the interesting development of the facts in the latter publication.

33. _See supra_ note 32 (describing Wigmore's actual first days of classes in new school). As mentioned previously, the aggressor was the superintendent at the public school. Furthermore, the quoted statements were not actually uttered but were added for purposes of this Article.
the teacher's use of physical force against John Henry. It is simply not logically relevant to infer that the behavior of the teacher was triggered by John Henry's placement, rather than being triggered by the teacher's own inherent propensities.\textsuperscript{34}

The school set about to make things right. First, the school fired the teacher. This was simply the last in a long series of incidents where this teacher had responded poorly to the tender sensibilities of these young souls. Second, the principal issued a memo to all of the teachers discussing the need for restraint when dealing with hysterical children. The memo set forth new rules requiring teachers to call for one of the staff from the assistant principal's office to come immediately to the classroom in the event that a child becomes hysterical. The staff member is to observe the condition of the hysterical child and then to confer with the teacher regarding what measures should be taken.\textsuperscript{35}

After taking these actions, the school contacted the Wigmores and their attorney. A meeting was held at which all lawyers and parties were present. The school authorities apologized to the Wigmores and admitted that the teacher's actions were inappropriate. The school advised the Wigmores of the steps they had taken after the event occurred. Further, the school authorities offered to settle the matter by paying a small sum to make matters whole.\textsuperscript{36} The

\textsuperscript{34} See Fed. R. Evid. 401 (defining minimal logical relevance). This paragraph gives an example of minimal logical relevance in accord with the definition of Federal Rule of Evidence (Federal Rule) 401. This explanation is also in accord with Wigmore's discussion of the common law principle of relevance. See 1A J. Wigmore, Evidence in Trials at Common Law § 27, at 965 (P. Tillers rev. 1983) (stating that offering of fact into evidence is implication that fact has some bearing on proposition at issue). The question of logical relevance is essentially one of the ordinary laws of reasoning, regardless of whether the question is to be decided by a judge or a layperson. Id. The logical powers employed in the court must be those of everyday life, rather than those of a trained expert. Id. Moreover, the logic employed in the court is frequently unarticulated and applied in an instinctive, and possibly nonsystematic, fashion. Id.

\textsuperscript{35} See Fed. R. Evid. 407 (setting forth general rule of inadmissibility of subsequent remedial measures and rule's exceptions). This paragraph sets up several illustrations of subsequent remedial measures that would be excluded from admission into evidence under Federal Rule 407. The prevailing interpretation of Federal Rule 407 is in accord with Wigmore's discussion of the common law rule. See 2 J. Wigmore, Evidence in Trials at Common Law § 283(4), at 174 (J.H. Chadbourn rev. 1979) (discussing repairs of machine or highway after injury and taking measures to remedy injury).

Subsequent remedial measures after an injury do not always indicate a belief by the owner that the owner's negligence caused the injury. Id. Rather, the owner's remedial measures merely indicate a belief that the injury-causing object was capable of causing such an injury, and nothing more. Id. This rationale is equally consistent with a belief of injury by mere accident or by contributory negligence, as well as by the owner's own negligence. Id. Consequently, because acts of repair or improvement do not necessarily lead to an inference of negligence, such acts shall be excluded from evidence. Id. Furthermore, subsequent remedial measures should be excluded because admission may lead the jury to unjustly overemphasize the repairs or actions, serving to chill innocent and genuine acts of repair. Id.

\textsuperscript{36} This paragraph illustrates discussions which are covered in protected settlement dis-
Wigmore accepted the offer and dropped the litigation. John Henry acclimated to his new environment and subsequently did well at this school.

Later in life, we see John Henry pondering this earlier incident, which he still remembers as though it were only yesterday. Actually, John Henry had been day-dreaming in the midst of writing his treatise on evidence. John Henry reflects "the school was right!" There is no minimal logical relevancy between the classroom placement and the later assault upon him.\textsuperscript{37} One's mind, in deliberating the truth of what happened here, should not be pressed with unnecessary facts in coming to judgment. Distraction and subjective distortion should be kept to a minimum.\textsuperscript{38}

In pondering further, John Henry believes that what the school did after this assault positively reflected upon the school's administrators. All individuals and institutions should unabashedly and regularly remedy matters they encounter—regardless of whether such individuals and institutions are technically at fault for the mishap. Is it not a worthy goal to have people strive to be better? Shouldn't people attend to how their goods and services affect others?\textsuperscript{39}

Also, given that John Henry was a gentle spirit, he thinks it is a virtue to admit wrong and settle one's accounts. To avoid the situation and promote conflict simply results in additional waste of energy by all persons involved.\textsuperscript{40} John Henry amuses himself by
cussions under Federal Rule 408. Rule 408 is in accord with Wigmore's description of the common law principle. Under the common law, an offer to settle a claim by partial or complete payment does not amount to an admission of liability. 4 J. \textbf{WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW} § 1061, at 34 (J.H. Chadbourn rev. 1972). Behind this policy is the rationale that hypothetical or conditional concessions can never be interpreted as an assertion of a party's actual belief. \textit{Id.; see id.} § 1061, at 33-34 (discussing alternative theories for inadmissibility of settlement offers).

\textsuperscript{37} See supra note 34 and accompanying text (giving example of minimal logical relevance). This example is in accord with Wigmore's explanation of relevance and Federal Rule 401. See 1A J. \textbf{WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW} § 27, at 965 (P. Tillers rev. 1983) (describing Wigmore's conception of logical relevancy).

\textsuperscript{38} This portion of the story and its reasoning are intended to review the rule of exclusion due to prejudicial effect, Federal Rule 403, as well as the admission of relevant background information pursuant to Federal Rule 401. See 1A J. \textbf{WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW} § 29(a), at 978 (P. Tillers rev. 1983) (discussing cases and hypotheticals in which otherwise relevant evidence should be inadmissible). Under the common law, relevant evidence may be inadmissible because of other factors such as confusion of issues, unfair surprise, or undue prejudice. \textit{Id.}

\textsuperscript{39} See 2 J. \textbf{WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW} § 283, at 175 (J.H. Chadbourn rev. 1982) (acknowledging legitimacy of policy argument with particular emphasis on potential undue influence on jury of subsequent remedial measure evidence). Furthermore, this statement corresponds to the prevailing interpretation of Federal Rule 407. See \textbf{FED. R. EVID.} 407 advisory committee's note (stating that exclusion of subsequent remedial measures promotes social policy of encouraging people to pursue steps in furtherance of added safety).

\textsuperscript{40} See 4 J. \textbf{WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW} § 1061, at 33-47 (J.H. Chadbourn rev. 1972) (expounding on settlement discussions). Actually, this is not an accu-
labeling such behavior as virtuous—a term many of his colleagues rarely used when discussing human motivation.

John Henry continues, lost in his reflections. His focus now returns to that terrifying man who changed that day at school into such a nightmare. It may have been that this errant teacher was prone to this type of behavior with his students. The school admitted that this was so by informing his family that the teacher had been terminated. John Henry now muses how dangerous it would be to judge this man not for what he did to John Henry, but on what he had done before. Dangerous because it seems to John Henry that to judge guilt in this case by relying on the man’s previous history increases the chance that the inquiry would change from an examination of what the teacher had done in this particular incident into an examination of the man himself—his character! Should there be no mercy? How wrong is it to continue to judge a person

rate statement of the scholar’s sentiments regarding settlement discussions. Wigmore found the rationale that the expectation of privacy in negotiation promotes settlement to be a dubious theory. Id. § 1061, at 34-35. Wigmore doubted whether recognizing privacy of communication is necessary to foster private settlements and whether the benefit from the reduction in litigation under such privilege outweighs the justice that is affected by the free flow of evidence made available through denying the privilege. Id. § 1061, at 35. Nonetheless, the advisory committee note to Federal Rule 408 explicitly validates this theory. See Fed. R. Evid. 408 advisory committee’s note (stating that excluding evidence of offers to compromise promotes compromise and settlement of disputes).

41. I use these facts as an example of admissions of fact not to be excluded from evidence on the grounds that disclosure occurred during settlement discussions. See United States v. Shotwell Mfg. Co., 287 F.2d 667, 673 (7th Cir. 1961) (drawing distinction between offers to do something in furtherance of compromise that are inadmissible, and independent admissions of fact that are admissible), aff’d, 371 U.S. 341, reh’g denied, 372 U.S. 950 (1963).

42. Here I introduce an example of prior bad acts to show character as contemplated by the rule of exclusion in Federal Rule 404(b). See Fed. R. Evid. 404(b) (stating rule that evidence of other crimes, wrongs, or acts is not admissible to prove character).

43. See 1A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 57, at 1180-81 (P. Tillers rev. 1989) (discussing rationale behind excluding evidence of accused’s moral disposition). Wigmore points out the absence of probative value in such an argument. Wigmore recognized that, although the accused’s moral disposition may be of value in indicating the probability of whether the accused did or did not engage in a particular act, such evidence should be excluded. Id. § 57, at 1180-81. Policy operates to exclude relevant evidence to avoid undue prejudice and unjust condemnation that may accrue to the accused, resulting not from the act but from his character. Id.

Various courts have affirmed this basic principle. See, e.g., Michelson v. United States, 355 U.S. 469, 475-76 (1948) (stating that common law rule generally excludes evidence of accused’s character because such evidence tends to be prejudicial to one with bad general record and serves to deny fair opportunity to defend against particular charge); Reyes v. Missouri Pac. R.R., 589 F.2d 791, 793-94 (5th Cir. 1979) (holding that character evidence is of slight probative value yet very prejudicial); United States v. James, 555 F.2d 992, 1001 (D.C. Cir. 1977) (stating that evidence of defendant’s prior crimes diverts jury’s attention from defendant’s responsibility for crime charged to improper question of defendant’s bad character); United States v. Fox, 475 F.2d 131, 134-35 (D.C. Cir. 1972) (holding that admission of evidence of bad character increases possibility that defendant will be convicted of being “bad man” in jury’s eyes, rather than being tried for crime that defendant was charged). The advisory committee note to Federal Rule 404(b), however, omits discussion of the underlying theory for exclusion of character evidence. Fed. R. Evid. 404 advisory committee’s note.
in the present by focusing on prior behavior? Instead, shouldn't society encourage people to mend their ways by looking to a future that is not burdened with past judgments? John Henry sees this protection as deterring further anti-social behavior.44

John Henry now jostles himself from his musings. He is then able to write a learned commentary on why these social values deserve protection and, thus, why his fellow esquires should not be permitted to disregard these values in the courtroom. He writes late into the night, page after page of admonition supporting the forbearance of considering relevant evidence in coming to judgment where there is valid social policy regarding how individuals should conduct their affairs with one another. It seems a reasonable trade-off to John Henry to perhaps deny justice in an individual case by prohibiting relevant evidence from reaching the ears of the jury to better the quality of life experienced in daily public interaction.45

B. Narrative Two: Privileged Communications and the Attorney's Work Product Protection

The following short story reviews some of the general rules of privilege and quasi-privilege. The narrative covers the physician-patient privilege, the attorney-client privilege, and the rule protecting attorney work product.46 Although the principle of work product protection is not embodied in the Federal Rules,47 it is sufficiently related to the concepts of privileged communications to warrant a single presentation.

Again, we find John Henry Wigmore engrossed in writing his treatise on evidence. We find him working outside on his porch. He faces Lake Michigan, which he finds encourages a nice mixture

44. See supra note 43 (discussing Wigmore's rationale for this rule of law).
45. See 1A J. Wigmore, Evidence in Trials At Common Law § 29(a), at 978 (P. Tillers rev. 1983) (discussing policy reasons for discarding relevant evidence). Section 29(a) is more of a discussion that generically deals with the role of practical policy counteracting relevancy. Thus, Wigmore does not make the deduction that I do in the last sentence of this paragraph in the text.
   Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.
Id. (emphasis added).
of concentration and day-dreaming.48

John Henry is contemplating the evolution of privileged communications in the doctrine of evidence. He has always felt that this area of evidence law is hazardous to American justice because privilege can hide from trial information that is vital to the ascertainment of truth.49

John Henry is an avid pianist and composer.50 Such abilities were cultivated during his youth when he was required to practice piano more than he cares to remember.51 John Henry begins to reminisce about the creation of his favorite small composition written on the eve of attending Harvard Law School.

John Henry remembers how he could not stop playing this particular tune. It haunted him all the time. He knew he did not have it quite right. He had to keep playing it until he got it just right.

During this same time John Henry developed difficulty with his left wrist. John Henry’s wrist would bother him when playing the piano. John Henry had to play the piano while composing his tunes. John Henry thought it wise to consult a physician to determine the cause of his difficulty, which was interfering with the completion of his new musical composition. He was becoming chronically distracted with this incomplete tune inside his head.52

The physician determined that the bones in John Henry’s wrist were unstable and that a tight bandage when playing the piano, along with exercises to strengthen the muscles in the wrist, were all that was necessary to aid John Henry’s recovery. John Henry fol-


49. See 8 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §§ 2285-2287, at 527-40 (J.T. McNaughton rev. 1961) (discussing confidential communications in general). Wigmore states that only a “preponderance of extrinsic policy” will justify the recognition of the principle of privilege. Id. § 2285, at 527. Wigmore also cautions against expanding the law of privilege. He believes that four conditions are necessary to establish a privilege against the disclosure of communications: (1) the communications must originate in confidence or else they will not be disclosed; (2) this confidentiality must be essential to the “full and satisfactory maintenance” of the party’s relations; (3) in the community’s opinion, the relation ought to be fostered; and, (4) the injury resulting from disclosure of the communication must outweigh the benefit gained from litigation. Id.


52. See id. (stating that Wigmore was often at piano playing his tunes and other songs at parties); W. Roalfe, John Henry Wigmore: Scholar and Reformer 9, 67-68 (1977) (stating same). The particular episode in this story, however, is fictional. I created this scenario to facilitate the review of privilege.
followed the doctor’s instructions and was able to complete his tune later that week. Thereafter, he often played the tune at social gatherings. It was an upbeat, rhythmic, playful tune. In the months that followed, his wrist again became stable and strong.

Turning his thoughts now to privileged communications, John Henry questions himself about this earlier episode with his wrist. He has always felt uneasy about the creation of a physician-patient privilege by legislative action within the different states of the union.53 He felt this development was undeserved when examined in light of the factors that common law deemed necessary for the recognition of any privilege.54 John Henry knows he is powerless to destroy the avalanche of state statutes enacting physician-patient privileges. He should be able to influence thoughtful legal thinkers, however, about the states’ mistakes, and perhaps over time, this unfortunate privilege would dissolve into history.55

Take John Henry’s case for example. He was certain that he possessed no interest in keeping secret what he said to his doctor. After all, a wrist is a wrist and there is no basis to be self-conscious about it. He sought the doctor’s attention purely for a remedy. He never thought that his communications with the doctor were encouraged by an awareness of a shield of secrecy to protect what he said during treatment.56 In reality, such a concept seems quite unnecessary. It may be that, in some instances, a patient might feel that the later revelation of communications with a physician has infringed upon one’s subjective experience of privacy. But, that is a matter of indi-

53. See 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380(a), at 829-31 (J.T. McNaughton rev. 1961) (explaining that there is no plausible justification for protecting communications between patients and physicians). The rationale courts commonly invoked as justification for the physician-patient privilege is that full and open disclosure is necessary to enable physicians properly to prescribe relief for their patients. See, e.g., Edington v. Mutual Life Ins., 67 N.Y. 185, 194 (1871) (stating that disclosure of secrets revealed at sickbed destroys confidence between patient and physician and prevents flow of benefits from such a confidential relationship); P. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 9.01B, at 1032-33 (2d ed. 1990) (discussing traditional rationale of physician-patient privilege and noting that privilege is only part of state jurisprudence and not Federal Rules of Evidence); 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380(a), at 828-32 (J.T. McNaughton rev. 1961) (discussing justification articulated in support of privilege and testing arguments in light of four fundamental canons that must be satisfied by every privileged communication). Wigmore found the rationale for the privilege to be tenuous. Id.

54. See 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380(a), at 829-32 (J.T. McNaughton rev. 1961) (discussing why physician-patient privilege does not comply with “fundamental canons” needed to be satisfied by every privilege for communications); supra note 49 (listing common law factors to determine whether type of communications deserve protection as privilege).

55. See 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380(a), at 832 (J.T. McNaughton rev. 1961) (“There is little to be said in favor of the privilege and a great deal to be said against it. The adoption of it in any other jurisdiction is earnestly to be deprecated.”).

56. See id. (noting that Wigmore sees few situations where patients actually attempt to preserve real secrecy).
individual sensitivity. Such sensitivity does not, however, reasonably seem to cause a person to forego medical aid. Nor did it strike John Henry that his doctor needed a shield of future secrecy to treat him. 57 All the doctor needed to do was manipulate the wrist and discuss the matter with John Henry. Even where a sensitive matter is involved, the balance should be struck in favor of disclosure when the evidence is relevant to a matter being litigated. To do otherwise would cripple a fundamental attribute of trial—the pristine adversarial development of historical fact. 58

John Henry continues, lost in these mental meanderings. He begins to hypothesize! Now the case would have been different if his tune writing was interrupted not by a physical limitation, but by a perplexing emotional question. John Henry thought, how lucky he was that he rarely experienced writer’s block in finishing a tune or in anything else for that matter. 59 But—suppose he had! If he went to either a physician or counselor regarding this malaise, he could readily see how his candor regarding his innermost thoughts would be chilled by the knowledge that, in the interests of justice, some litigant could later force a public airing of such communications. John Henry thus decides to separate these two situations into different privileged communications for separate doctrinal treatment. 60

57. Wigmore specifically outlines this argument. See id. § 2380(a), at 830 (finding that people sought medical treatment in generation before establishment of privilege, and concluding that people are not deterred from seeking medical help because of possibility of disclosure in court).

58. See id. § 2380(a), at 830-32 (concluding that injury to physician-patient relation not greater than injury to justice by repressing medical testimony needed to learn truth).

59. This portion is a transition from physician-patient privilege to psychotherapist-patient privilege.

60. Although Wigmore cites the existence of privileged communication for psychologists in some state jurisdictions, he does not discuss the matter. See 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2286, at 534-35 n.23 (citing only state statutes protecting communications to psychologists). Thus, the rationale for the psychotherapist-patient privilege is absent from his treatise. Nevertheless, there is federal case law that recognizes the psychotherapist-patient privilege. See, e.g., In re Zuniga, 714 F.2d 632, 639 (9th Cir.) (concluding that psychotherapist-patient privilege is mandated by “reason and experience”), cert. denied, 464 U.S. 983 (1983); In re Grand Jury Subpoena, 710 F. Supp. 999, 1015 (D.N.J. 1989) (holding that psychotherapist-patient privilege exists in context of federal grand jury subpoenas); Sabree v. United Bhd. of Carpenters & Joiners of Am., Local No. 33, 126 F.R.D. 422, 424-26 (D. Mass. 1989) (applying state statute recognizing psychotherapist-patient privilege to preclude discovery of records of worker’s psychotherapist in action by worker against union for racial discrimination); United States v. Friedman, 636 F. Supp. 462, 462-63 (S.D.N.Y. 1986) (holding records containing intensely personal communications as protected by privilege); Jennings v. D.H.L. Airlines, 101 F.R.D. 549, 550-51 (N.D. Ill. 1984) (finding psychologist’s records of former employee protected by privilege). But see, e.g., United States v. Lindstrom, 698 F.2d 1154, 1167 (11th Cir. 1982) (recognizing privacy interest of patient in medical records and societal interest in encouraging free flow of information embodied in psychologist-patient privilege, but noting that those interests are subordinate to defendant’s right to cross-examine witnesses in criminal case); United States v. Meagher, 531 F.2d 752, 753-54 (5th Cir. 1976) (declining to recognize privilege for communications between psychiatrist and patient that were made while defendant was voluntary member of psychiatrist’s study in crimi-
As John Henry reorganizes his notes on privilege, he poses a question to himself. Other than his personal deep esteem for the legal profession, why does he accord complete primacy to secrecy in communications occurring in the attorney-client relation and yet deny it to medical doctors? Clearly, he feels that lawyers have more responsibility than doctors for influencing the moral development and actual behavior of the public. It inures to the attorney’s function as counsel to give advice on matters that would never have been disclosed in the absence of confidentiality. John Henry concludes that the attorney-client relationship is actually more similar to the psychotherapist-patient privilege because both professional relationships cannot exist in the real world without a strong guarantee of privacy.

John Henry thus continued to write about the important distinctions between the medical and legal professions and the lack of comparison in the medical profession’s direct impact on the administration of justice. In fact, John Henry recalls one of his cases where he represented a fellow musician and composer (a talented player but rather a flat composer) in a contract action against a local concert hall. John Henry’s observations of the defendant’s business practices and his development of legal theories regarding implied breach were a product of his mental energies in crafting a tight case out of a muddle of facts. Although these materials were not privi-

---

61. See 8 J. Wigmore, Evidence in Trials at Common Law § 2380(a), at 831 (J.T. McNaughton rev. 1961) (distinguishing two privileges and putting forward particular grounds for protecting confidentiality of attorney-client communications). Wigmore states that the physician’s curative aid is commonly rendered irrespective of the patient’s making of disclosures. Id. § 2380(a), at 830-32. Further, the relations with the patient are not consciously affected because physicians are rarely called upon to make such disclosures. Id. Communications between physicians and their patients, thus, should not be protected to the same extent as communications between attorneys and their clients. Id.

62. 8 J. Wigmore, Evidence in Trials at Common Law § 2380(a), at 831 (J.T. McNaughton rev. 1961).

63. See id. § 2380(a), at 828-32 (finding fault with rationale put forward by medical profession in support of protecting communications). Wigmore recommends enacting legislation allowing courts to require disclosure where necessary. Id. § 2380(a), at 832.

64. I am setting up an example for the law on disclosure of trial preparation materials in general, and the protection of an attorney’s mental impressions, opinions, and legal theories in particular.
leged communications with his client, these matters deserved protection from his overzealous adversary. Why? Because John Henry's exercise of his mental processes comprised his abilities to render legal representation. Pilfering his thoughts would directly have thwarted the administration of justice in this case. How could John Henry go about the business of preparing a matter if he was always simultaneously concerned that his adversaries would be given the fruits of his toil to defeat his efforts? The judge was correct in that case to deny John Henry's adversary the opportunity to fish in such fertile waters.

John Henry jostled himself back to concentrating on his chapter addressing privileged communications. This concern for the safeguarding of attorneys' materials from the uncontrolled appetites of adversaries does not fall within the scope of his scholarly discourse on privilege. Rather, this matter should be attended to by other scholars writing about the regulation of pre-trial activities of lawyers.

C. Narrative Three: Refreshing Memory, Authentication, and Witness Competency

This short story reviews several evidentiary concepts relating to the use of witnesses and the use of writings in trial. Specifically, the narrative will begin with the use of writings to refresh memory, the hearsay exception of recorded recollection, authentication and identification, self-authentication, and the contents of writings, recordings, and photographs. Finally, the narrative reviews judicial notice of adjudicative facts, witness competence, and Deadman statutes.

We find John Henry Wigmore intensely studying a variety of maps and guide books for a sojourn into the countryside of northern California. John Henry had always wanted to explore the more re-

---

68. Fed. R. Evid. 901.
71. Fed. R. Evid. 201.
73. See supra note 79 (discussing Deadman Statutes).
74. See W. Roalfe, John Henry Wigmore: Scholar and Reformer 74 (1977) (noting that Wigmore loved to travel, researched history of places of interest in preparing itineraries, and was reputed to avidly study maps and guide books in preparation for trips). California was Wigmore's state of birth, as well as a place he lived for some years. Roalfe, John Henry
mote parts of the California mountains. He was born and grew up in California, and felt that he should see more of rural California. He wanted to see the majestic scenery but stay away from tourist spots. John Henry had a reputation for loving to travel and planning novel routes for getting from here to there.

John Henry has been compiling alternate routes, making lists of the specific sites he wants to see, and computing the distances involved to determine where overnight lodging would be necessary, in order to make advance reservations at local inns or arrange to stay with friends.

Also on John Henry’s desk is blank paper used to record all of the items to be packed in his car and luggage. He will later store the list in a safe place in the event of theft or other mishap.75 John Henry is known for being a thoughtful organizer of life’s events, so this obsession with detail should surprise no one. He would often say, “Make a record of everything as you are in the midst of everything. Better prepared than sorry.”

A week later we find John Henry happily driving rural dirt road through secluded areas of the mid-California coastal mountain ranges. As luck would have it, John Henry’s trip was abruptly detoured on the fourth day of his travels when he stopped at a small cafe for lunch not too far from San Marcos Pass. While dining, some clever thief unlocked John Henry’s vehicle and removed almost everything he had packed in the car. At least John Henry knew what to do—being a lawyer also comes in handy during a personal crisis once in a while. John Henry called the police and his insurance company. John Henry filled out the necessary police reports and filed the necessary claims with his insurance agent. He was thankful for his handwritten complete list of belongings that he had placed in the glove compartment. It was still there. Let this be a lesson to all those that are critical of his penchant for meticulous planning.

John Henry is back at the cafe planning his next move and determining what he must attend to in order to continue his journey. Staring down at his coffee, his mind begins to wander its way back to his treatise on evidence, which is always on his mind, even when out of sight.

Suppose he has to sue the insurance company to recover on his

---

Wigmore—Scholar and Reformer, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 277, 299 (1962). Again, the facts of the actual journey in this short story are fictionalized to fashion a story addressing the rationale for the evidence doctrine contained in this story.

75. This example is the basis for the doctrinal application of documentary evidence in general for the remainder of this story.
claim. Would his proof be in order for such a suit? What would he need to prove? Did he have it to prove? First, John Henry smugly thought to himself, "My strongest evidence is me—my live testimony regarding this minor tragedy. Put me on the stand," he thought, "and let the judge determine my truthfulness." He pondered how he would have fared a hundred years earlier. Not as well, he thought, because the judge would have denied John Henry the opportunity to testify on his own behalf. Because he is a party or interested person in the litigation, he would have been regarded as a presumptively unreliable source of evidence. Now the matter is correctly confined to whether John Henry is credible of belief—that is, unless there is a decedent involved in this matter, but nobody has died yet in this case.

But what would happen if, once on the stand, John Henry's memory failed. He can't imagine that happening in ordinary circumstances. However, if he must correctly recall every stolen item, he is bound to be forgetful. This should not be a problem because his list can be used to refresh his memory. Then he should be able to resume testifying from his refreshed memory. Actually, he thinks it

76. This part of the short story is an example of the question of witness competency.

77. See 2 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 576, at 817 (J.H. Chadbourn rev. 1979) (noting that abolition of interest as disqualification of witness in United States primarily occurred between 1846 and 1856). In this review narrative, John Henry is contemplating this approach to competency as if it were "a hundred years earlier." Wigmore died in 1943. The fictional reference is to a time frame approximately one hundred years earlier than his death. The important point is that students understand the statutory abolition of the common law and distinguish that rule from current practice.

78. See id. § 576, at 810 (discussing historical evolution of theory of disqualification by interest and its eventual statutory abolition). Wigmore believed that the syllogism, that persons having a pecuniary interest should be totally excluded because they are likely to testify falsely, is unsound. Id. He concluded that a pecuniary interest does not necessarily raise the likelihood or falsehood, and that, even if it did, the risk of falsehood is not best avoided by excluding such testimony. Rather, cross-examination provides the appropriate means of alerting the fact-finder of potential bias. Id. Wigmore's analysis corresponds to the view codified in Federal Rules 601, 602 & 603.

79. This is a passing reference to the still existing Deadman Statutes in several state jurisdictions—the surviving remnant of the common law testimonial bar by parties or interested persons to the litigation. The Deadman Statutes generally exclude the testimony of the survivor of a transaction with a decedent, when offered against the decedent's estate. See 2 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 578, at 819-23 (J.H. Chadbourn rev. 1979) (discussing evolution of Deadman Statutes in United States).

The Federal Rules of Evidence reject the Deadman Statutes by creating a presumption that every person is competent to be a witness. See Fed. R. Evid. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); United States v. Lightly, 677 F.2d 1027, 1028 (4th Cir. 1982) (holding that witness is competent unless: (1) shown to lack personal knowledge of matter that witness is to testify; (2) witness is without capacity to recall; or, (3) witness does not understand her duty to testify truthfully).

80. See 3 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §§ 758-765, at 125-45 (J.H. Chadbourn rev. 1970) (stating that writing or other items generally may be used to stimulate recollection); see also Fed. R. Evid. 612 advisory committee's note (discussing treatment of writings used to refresh memory while on stand).
is wise that anything can be used to help revive his memory, including his travel guide books or even a match book cover from that San Marcos cafe.\textsuperscript{81} After all, the facts to be deliberated upon come from his live testimony and not from the stimulus used to jog his recall. But, what will occur should John Henry’s memory fail him completely regarding all the contents of his luggage and car?\textsuperscript{82} What then? A case should not be denied judgment if there is a reliable substitute for his testimony under oath! Would his list satisfy the requirements of past recollection recorded so that it may take the place of his utterance?\textsuperscript{83} He can testify that he had knowledge of the matter and that the accounting is accurate. He took great pains to itemize the contents. If his memory is impaired, he would be able to testify that his memory is exhausted on the matter.\textsuperscript{84} John Henry made the list a week before the theft. Since John Henry made this list while he packed,\textsuperscript{85} the judge would likely find John Henry made his list while the matter was fresh in his memory. There is no question of adoption since John Henry drafted the list himself.\textsuperscript{86} He will

\textsuperscript{81} 3 J. Wigmore, Evidence in Trials at Common Law § 758, at 125-28 (J.H. Chadbourn rev. 1970). Wigmore presents the still valid common law rule that any physical object or thing, such as a scent or writing, may be used to refresh the memory of a witness. Several cases, in dicta, provide examples of things allowed to help revive memory: “[I]t may be a song, or a face, or a newspaper item.” Jewett v. United States, 15 F.2d 955, 956 (9th Cir. 1926). It may be “the whistling of a tune, the smell of seaweed, the sight of an old photograph, the taste of nutmeg, the touch of a piece of canvas.” Fanelli v. United States Gypsum Co., 141 F.2d 216, 217 (2d Cir. 1944). It may be “an allusion, even a past statement known to be false.” United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), cert. denied, 329 U.S. 806 (1947). It may be “a line from Kipling or the dolorous refrain of ‘The Tennessee Waltz’; a whiff of hickory smoke; the running of the fingers across a swatch of corduroy; the sweet carbonation of chocolate soda; the sight of a faded snapshot in a long-neglected album.” Baker v. State, 35 Md. App. 593, 602-03, 371 A.2d 699, 705 (1977). This aspect of the law of refreshing memory is expressly included in this short story to remind students that generally anything can be used to trigger a witness’ memory although Rule 612 is confined to writings.

\textsuperscript{82} This portion of the story sets up the scenario for the review of past recollection recorded.

\textsuperscript{83} The discussion that follows is a review of the key elements of the hearsay exception for recorded recollection. Fed. R. Evid. 803(5). For a discussion of each of the requirements of the recorded recollection exception to the hearsay rule, see 3 J. Wigmore, Evidence in Trials at Common Law §§ 744-749, at 93-107 (J.H. Chadbourn rev. 1970).

\textsuperscript{84} See 3 J. Wigmore, Evidence in Trials at Common Law § 738, at 90 (J.H. Chadbourn rev. 1970) (noting that federal courts and many states require express showing of absence of present recollection as preliminary to use of past recorded recollection).

\textsuperscript{85} See Fed. R. Evid. 803 advisory committee’s note (stating that reliability inherent in record made while events still fresh in mind is guarantee of trustworthiness).

\textsuperscript{86} See 3 J. Wigmore, Evidence in Trials at Common Law § 748(2), at 101-04 (J.H. Chadbourn rev. 1982) (noting that it is generally immaterial whether witness was individual who actually wrote record). The record may have been manually prepared by another. At the time that the witness sees the record and passes judgment upon its correctness, however, it becomes, for the witness, the correct record. Id. § 748(2), at 101. Nonetheless, in some instances, the fact that another person prepared the record may cause the court to doubt the witness’ guarantee and, therefore, reject the record. Id.

Federal Rule 803(5) also contains the requirement that the witness have insufficient recollection to testify fully and accurately. See Fed. R. Evid. 803 advisory committee’s note (discussing controversy surrounding preliminary requirement that witness’ memory be impaired).
be on the stand subject to cross-examination of these factors.\textsuperscript{87} John Henry concludes that his list is potentially an important piece of admissible evidence in his case. He should be prepared to testify to the authenticity of this list, to the fact that this list is the very same list he prepared prior to his journey, and that this document had not been altered in any way.\textsuperscript{88}

Although John Henry still has the original in perfect condition, he is a careful man indeed.\textsuperscript{89} When he drafted this list he made a carbon copy and placed it in his desk drawer for safekeeping. John Henry prides himself about his thoroughness as he now thinks this copy would be admissible evidence, instead of his original list, so long as the insurance company does not dispute the genuineness of the original in the first place.\textsuperscript{90}

Of course, all this attention to the details of admissible evidence is tiring. John Henry sighs, pleased with his assessment of his evidence. As he finishes his cup of coffee John Henry reflects on the need for economy and efficiency in matters of proof before a court.\textsuperscript{91} Otherwise, everyone involved would tire from the effort. A

\textsuperscript{87} See J. Wigmore, Evidence in Trials at Common Law \S 730, at 77 (J.H. Chadbourn rev. 1970) (stating that, on direct examination, witness may properly be asked to specify grounds for recollection, and reasoning that circumstances serving to fix or strengthen such recollection may show how witness is justified in such confidence and, thus, party offering witness is entitled to benefit). On cross-examination, the opponent is entitled to bring out circumstances which exhibit the untrustworthiness of the witness' recollection. \textit{Id.}

\textsuperscript{88} See Fed. R. Evid. 901(a) (requiring authentication or identification as condition precedent to admissibility of evidence). This requirement is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." \textit{Id.; see 7 J. Wigmore, Evidence in Trials at Common Law §§ 2129-2130, at 695-711 (J.H. Chadbourn rev. 1978) (discussing general principles of authentication and models of authenticating documents).}

\textsuperscript{89} What follows is a review of contents of writings, recordings, and photographs. See Fed. R. Evid. 1001 (defining writings and recordings, originals, and duplicates); Fed. R. Evid. 1003 (allowing admissibility of duplicates as long as authenticity of original, or unfairness of admission are not at issue).

\textsuperscript{90} I use carbon copy as the duplicate here because it was commonly used during this period. In addition, the common law of the best evidence rule evolved with the discussion of the admissibility of carbon copies. C. McCormick, McCormick on Evidence § 236, at 712-14 (E. Cleary 3d ed. 1984).

\textsuperscript{91} See Fed. R. Evid. 1003 (providing that duplicate is admissible to same extent as original, unless there is genuine question regarding authenticity or unfairness would result from admission). Federal Rule 1003 is compatible with Wigmore's discussion of the common law rule. The proof of loss of the original allows for the use of a copy. See 4 J. Wigmore, Evidence in Trials at Common Law §§ 1188-1198, at 430-60 (J.H. Chadbourn rev. 1972) (discussing authentication of lost documents). "When the execution of a document is not in issue, but only the contents or the fact of the existence of a document of such a tenor, no authentication is necessary." 7 J. Wigmore, Evidence in Trials at Common Law § 2132, at 714 (J.H. Chadbourn rev. 1978) (emphasis in original).

\textsuperscript{91} This statement of rationale is a transition in the story. On one hand, efficiency and economy were factors influencing the drafting of Federal Rule 1003, which sets forth the guidelines for admitting a duplicate in place of an original. See 5 J. Weinstein, Weinstein's Evidence §§ 1004(4)(01)-02, at 1004-29 to 1004-31, 1003(01), at 1003-04 to 1003-07 (1991) (stating that rule is designed to save time and expense previously wasted in producing
court should not be burdened with the process of formal proof for
matters that are to be considered but are not reasonably subject to
dispute.\textsuperscript{92} For instance, how would the judge determine where the
theft had occurred? The judge should be able to accept the fact that
the San Marcos pass is a mountain road in Santa Barbara County in
California and, thus, located within the court's jurisdiction.\textsuperscript{93} Practi-
cally every resident of California knows San Marcos Pass and has a
general idea of its location. Also, the judge should be able to take
judicial notice of the location of the San Marcos Cafe since the mat-
ter is capable of accurate determination and is readily verifiable by
maps that are unquestionably accurate.\textsuperscript{94} John Henry finishes his
thought that both examples are proper cases of adjudicative fact and
appropriate for judicial notice.\textsuperscript{95}

John Henry makes himself stop toying with the evidence implica-
tions of his insurance claim. He realizes that it would be better to
make a list of items he needs to replace before he can resume his
trip. In addition, he will now have to make another list of contents
that is to be placed once again in his glove compartment. But first,
he looks at his map so that he can modify his travels in order to
reach his friend's home by nightfall.

\textsuperscript{92} See also C. McCormick, McCormick on Evidence § 236, at 712-14 (E. Cleary 3d ed. 1984) (stating that insistence on original
places undue burden on litigants). On the other hand, economy and efficiency are key policy
reasons for the existence of the law of judicial notice. The scope of judicial notice covers facts
"which are actually so notorious to all that the production of evidence would be unneces-
sary." 9 J. Wigmore, Evidence in Trials at Common Law § 2571, at 731 (J.H. Chadbourn

\textsuperscript{93} 9 J. Wigmore, Evidence in Trials at Common Law § 2571, at 731 (J.H. Chadbourn

\textsuperscript{94} This is an example of geographical fact of common knowledge, one type of adjudica-
(discussing judicial notice of notorious miscellaneous facts); 9 J. Wigmore, Evidence in Tri-
als at Common Law §§ 2580-2582, at 805 (discussing same). Judicial notice of geographical
facts such as location or character of sites is appropriate where such facts meet all require-
ments for judicial notice of adjudicative fact. See Davis v. United States, 185 F.2d 938, 944
(9th Cir. 1950) (holding that court may take judicial notice of principal geographic features of
United States because basic facts regarding natural features are not in serious controversy and
pose no questions of credibility between witnesses); Bradley v. United States, 254 F. 289, 291
(8th Cir. 1918) (concluding that court may take judicial notice of location of city, river, and
railroad lines); Campbell v. United States, 221 F. 186, 188-89 (9th Cir. 1915) (stating that
court takes judicial notice of general topography and climate of territory within its
jurisdiction).

\textsuperscript{95} See 9 J. Wigmore, Evidence in Trials at Common Law § 2566, at 713 (J.H.
Chadbourn rev. 1981) (citing example where court declares that fact does not need evidence
and then consults book, such as almanac, to inform itself).

\textsuperscript{96} Federal Rule 201 is confined to judicial notice of "adjudicative" facts. See Fed. R.
Evid. 201 advisory committee's note (defining adjudicative facts as facts of particular case).
Therefore, the two examples given in the short story are adjudicative facts. See generally Fed.
R. Evid. 201 advisory committee's note (providing helpful discussion of definition of adjudica-
tive fact).
D. Narrative Four: Lay Witness Opinion and Expert Testimony

The last short story reviews several of the concepts relating to opinion testimony. This episode in Wigmore's life facilitates review of the Federal Rules of Evidence concerning opinion testimony by lay witnesses,96 testimony by expert witnesses,97 bases of opinion testimony by expert witnesses,98 and opinion testimony on ultimate issues.99 Finally, the story covers the disclosure of facts or data underlying expert opinion.100

We find John Henry at his local library, thoroughly engrossed in reading detective novels.101 John Henry was addicted to the factual plots and adventure in detective novels. He would regularly check out from the library as many as five or six crime mysteries at a time. Apparently embarrassed over the matter, he was heard to comment to the librarian that he read detective novels to see how the law was applied in them.102 As truth would have it, John Henry had an avid interest in using scientific methods in solving crime,103 and crime novels often contained new scientific methods that aided the relentless detective in solving the mystery. John Henry's interest was put to good use. He became the organizer and founder of the Scientific Crime Detection Laboratory, which later became part of the Chicago Police Department.104 John Henry also was partly responsible for the introduction of special training for police in scientific methods of crime detection.105 Furthermore, John Henry was influential in persuading judges to accept the contributions of science in admitting evidence in criminal prosecutions.106

98. Fed. R. Evid. 703.
100. Fed. R. Evid. 705.
102. Id. (quoting Wigmore imploring Evanston librarian, "Do not, I beg of you, think I take these solely for amusement. I go through them rapidly to see how the law is carried out.").
103. Id. at 281-82 (discussing Wigmore's support for involving psychologists, psychiatrists, and social scientists in crime detection, at time when legal profession showed little interest in complicated crime analysis).
So here we see John Henry engrossed in his reading of a paperback thriller and spending several hours lost in imaginary crime detection. Mrs. Robbins came home to find her husband, Mr. Robbins, dead on the living room floor. She called the police for assistance. Sam Sneade, the chief detective, is summoned by the attending police officer. Upon arrival, Sneade studies the scene. He sees an unfinished glass of wine and an open wine bottle on the coffee table. There are several fresh fingerprints to be lifted for analysis. Sneade also finds fresh dirt marks on the carpet that lead to the body. Yet Robbins is wearing house slippers that are clean, and his shoes are neatly placed by the entrance to the door. There are no physical marks on the body suggesting foul play. There is an open letter apparently written by Robbins’ disgruntled business partner, Jones, on Robbins’ desk. Sneade now believes that Robbins was murdered.

The first police officer on the scene indicates to Sneade that Mr. Smith, Robbins’ neighbor, came over when he saw the police arrive. When told of the bad news, Smith said he wanted to speak to the detective in charge, but would say nothing else. After examining the crime scene, Sam Sneade orders that the physical evidence be taken to the crime lab.

Mrs. Robbins confirms that Jones and her husband have been quarreling seriously over her husband’s desire to dissolve the business. Although the business was successful, Robbins wanted to move on to new endeavors. Yet, Robbins did not want Jones remaining in the company alone. He felt the quality of their advertising business would decline significantly because of Jones’ lack of creative spark. Thus Robbins’ name would become associated with inferior work. Jones was distraught over this breakup.

Later, Sneade interviews Robbins’ neighbor, Mr. Smith. Apparently, earlier that evening Smith saw Jones approach Robbins on the street in front of the Robbins’ home. Jones acted friendly and hugged Robbins. Jones had what looked like a bottle of wine in his hand, which he gave to Robbins. They were chatting and laughing as they entered the Robbins’ home. Smith was suspicious of this because just a few nights before, Smith saw the two men arguing loudly in front of the Robbins’ home. Jones was holding Robbins’ arms and shoving him. Smith was so worried about his close friend

107. The scenario that follows is created for the purpose of providing illustrations for opinion testimony and expert witnesses. Fed. R. Evid. 701-705 (governing parties’ use of expert witnesses and testimony in federal courts).
Robbins that he went to see him the next day. Robbins identified the man as Jones and confided in Smith about his business troubles.

On the second day of the criminal investigation, Sneade receives the test results. Poison was added to Robbins' wine glass. There are fingerprints of someone else, in addition to Robbins', on the wine glass. The dirt smudges near the body reveal blue wool textile fibers of the type found in heavy wool clothing, such as a man's overcoat. The fibers did not come from any of Robbins' clothing.\(^{108}\)

Unfortunately for John Henry, the novel stops abruptly at the arrest of Jones and the successful comparison of fingerprints and fiber samples. John Henry wanted to read about the murder trial. He ponders, how would the evidence have been handled by the judge? John Henry is so disappointed by this abrupt ending that he decides to play out in his mind what would have happened. It is clear that the author of this novel is neither very clever nor complete. John Henry concludes that he will avoid reading selections from this author in the future.

John Henry now has the murder trial clearly in mind. Funny, the judge resembles Wigmore himself. Mr. Smith is on the stand and commencing testimony. John Henry hears the witness attest, "The defendant hugged Mr. Robbins. Mr. Jones looked friendly and happy."\(^{109}\) John Henry now sees defense counsel, who looks just like one of his old adversaries who usually lost to John Henry, rise and object, saying, "Objection your honor. I move to strike the answer because it is stated in the form of an opinion." The learned judge pauses and then states, "Overruled!" John Henry agrees with the ruling because he feels that it makes no sense to force a witness to speak in unnatural ways on matters that the witness has observed. What a meaningless exercise it would be to force the witness to otherwise express the friendly and happy behavior of Jones.

The prosecution's case-in-chief is progressing. There now ap-

---

108. This part of the short story sets forth the types of scientific evidence that will be the subject of the expert testimony. See Fed. R. Evid. 705 (delineating limitations on and scope of admissibility of expert opinions).

109. See Fed. R. Evid. 701 (eliminating common law prohibition on opinion testimony by lay witnesses and allowing such testimony if rationally based on witness' perception and helpful to trier of fact). This part of the short story reviews lay witness opinion testimony. Wigmore's discussion is in accord with the principle of discretion, rather than a complete mechanical bar to the use of lay opinion testimony. 7 J. Wigmore, Evidence in Trials at Common Law § 1924(2), at 32-34 (J.H. Chadbourn rev. 1978). Wigmore believed that to require strictly factual testimony without any inferences by the lay witness would be virtually impossible. Id. Given the problems inherent in applying the common law lay-opinion rule, Wigmore believed that courts should invite any rationally-based lay testimony that could aid the trier of fact. See id. (discarding common law rule and admitting lay opinion testimony) (citing Paquette v. Connecticut Valley Lumber Co., 79 N.H. 288, 109 A. 836 (1919)).
pears on the stand a stately older woman with wire-rimmed spectacles. She testifies that she has undergone extensive post graduate training in the chemical analysis of toxins as well as in textile composition analysis.\(^{110}\) The background of this witness persuades John Henry that this woman in fact possesses specialized knowledge that would permit her to speak about some of the physical evidence in this case in a more sophisticated way than could an ordinary lay person. Her information would be useful in accurately understanding the significance of the wine and fiber tests. The witness is now commenting on the general acceptance of these tests in her forensic fields, and she further discusses several factors that lead John Henry to believe that these tests are to be regarded as sufficiently reliable.\(^{111}\) The judge rules that the witness is qualified to testify as an expert in toxicology and fiber analysis, and that her testimony about the scientific tests will be sufficiently reliable for the jury to hear as evidence.

The prosecution proceeds with an orderly examination of this ex-

\(^{110}\) See Fed. R. Evid. 702 (allowing witness possessing specialized knowledge to testify if such knowledge would assist trier of fact). I include the qualifying of an expert in this short story because, in addition to being an admissibility issue, qualifying an expert witness adds to the witness' credibility and is a matter of trial advocacy skill. Wigmore emphasized the necessity for establishing the foundation of "experiential capacity." 2 J. Wigmore, Evidence in Trials at Common Law § 555, at 749-50 (J.H. Chadbourn rev. 1979). He believed that capacity is a relative concept dependent on the topic at hand and the type of experience required. Id. In other words, there is no fixed class of experts since an individual gains expertise through experience, not by association, and one need not be a professional or employed in an area of expertise to qualify as an expert. Id.

Wigmore differentiated between subjects that require merely "general" or "ordinary" experience, such as an expertise in sensing one's surroundings, shared by all able-bodied humans, and matters requiring special experience gained through occupation, scientific research, or otherwise. Id. § 556, at 750-52. Expert witnesses with specialized knowledge must be qualified prior to testifying. Id. Wigmore believed that no special experience should be required to qualify an expert unless it would be presumptuous under the circumstances for a person of ordinary experience to trust his own senses in testifying. Id. § 559, at 755. Where special experience is required of a witness, his qualifications must be shown by the sponsoring party. Id. § 560, at 755-56.

\(^{111}\) See Fed. R. Evid. 703 (delineating types of evidence of information experts may rely upon). Here I refer to the requirement of validation of the scientific theory or method relied upon by the expert. Federal Rule 703 permits the expert to rely on data as long as it is "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Id. Although I include the words "general acceptance" in the text, I do not cover the contents of the doctrine of general acceptance in this review. See Frye v. United States, 293 F. 1013, 1013 (D.C. Cir. 1923) (holding evidence of systolic blood pressure deception test inadmissible due to its lack of general acceptance by experts in field and creating general standard for admitting scientific evidence). Wigmore's discussion of these issues is brief and he accepts outright the necessity for scientific technology in matters of proof. Wigmore does not go into the criteria for determining validity, other than in his case summaries. See 2 J. Wigmore, Evidence in Trials at Common Law § 665(a), at 917-19 (J.H. Chadbourn rev. 1979) (acknowledging that scientist may employ "standard instruments" to prove things, even though such instruments may replace human senses); id. § 665(b), at 919-26 (arguing that expert should be permitted to base testimony on what has been written by other experts in field).
pert. The jurors look very attentive. Further along in her testimony, the expert states that her fiber analysis is based in part upon a report by a colleague who did the initial fiber scanning.112 It was regular procedure that initial microscopic scanning be conducted before she performs the chemical analysis. Defense counsel now objects to this expert's testimony. He further moves that her testimony be struck because it cannot be relevant if her statements are not based on evidence in the record. The fiber scan report had not been introduced. The judge abruptly overrules the objection. John Henry justifies this ruling to himself. It seems an injustice to deny the jury assistance in understanding the evidence when the expert has relied upon the type of information regularly relied upon in making such scientific findings.113 It makes no sense to John Henry to say that what scientists relied upon in conducting an investigation or experiment is not trustworthy for consideration by the jury. If defense counsel is worried about the accuracy of the scan or whether the report of the scan is of the correct sample, his remedy is to cross-examine the witness.114

The prosecution is now proceeding with testimony regarding the contents of the wine glass. The prosecutor asks the witness what her analysis of the wine left in the glass revealed. Counsel for the defense objects to this line of questioning because the witness has yet to testify as to the underlying facts that would support her conclusion. Both the judge and John Henry grow weary with this defense counsel. The judge exclaims, "Counsel, I'm sure you know as

112. 2 J. Wigmore, Evidence in Trials at Common Law § 665(b), at 919 (J.H. Chadbourn rev. 1979). Here I provide an example of a basis of expert opinion testimony on data not part of the record. See Fed. R. Evid. 703 (stating that information reasonably relied upon by members of profession may be part of expert's opinion testimony).

113. See 2 J. Wigmore, Evidence in Trials at Common Law § 665(b), at 919-26 (J.H. Chadbourn rev. 1979) (acknowledging expert witness may rely on data prepared by other experts in field).

114. This section covers the various sources that an expert may rely on in deriving an opinion under the Federal Rules of Evidence. See Fed. R. Evid. 703 advisory committee's note (providing that experts may base testimony on information received, which need not be independently admissible). The Federal Rules recognize three sources of data supporting expert opinion: (1) firsthand observation of the expert witness; (2) presentations at trial, including the use of hypothetical questions; and, (3) briefing of expert through outside, separate from the personal observations of the expert witness. Id. The Federal Rules departed from the common law regarding whether a party must first introduce the basis of an expert's opinion before allowing the expert's testimony into evidence. See Fed. R. Evid. 705 advisory committee's note (dealing with disclosure of facts or data underlying expert opinion). Federal Rule 705 eliminates the common law requirement that the proponent must bring out the basis of an expert's opinion on direct examination, and the rule permits the opponent to inquire into such basis during cross-examination. Id. The advisory committee acknowledges that Federal Rule 705 is criticized for giving the proponent an unfair advantage at trial by relieving that party of the burden of presenting the bases for an expert's opinion, but further notes that the rule has a long history supporting it in state statutes. Id.
well as I do that such a foundation is no longer required before this expert can state her findings.\textsuperscript{115} I imagine the prosecution is getting to the matter, and you will have the opportunity to cross-examine.\textsuperscript{116} Overruled!”

The trial continues and the prosecution succeeds in eliciting testimony showing that the wine glass contained wine tainted with arsenic, and that the fiber analysis of the dirt showed that the fibers matched defendant’s wool coat. The prosecution presents further evidence of defendant’s guilt. Finally, the prosecution rests!

We are now in the midst of Jones’ temporary insanity defense.\textsuperscript{117} His attorney is examining a psychiatrist who had interviewed Jones and looked at reports on Jones to render an opinion as to whether Jones possessed the specific intent to kill Robbins. That is, did Jones suffer from a mental condition or defect that was directly responsible for Jones’ actions? The jury has just heard the doctor’s observations of Jones’ symptoms, what the symptoms mean, and the clinical consequences of such a condition. The jury now hears defense counsel ask, “What is your opinion, to a reasonable degree of certainty, as to whether at the time of this tragedy, Mr. Jones was insane?” The prosecutor quickly shouts, “Objection. This question calls for a conclusion better left for the jury.” The judge nods in agreement and matter-of-factly says, “Sustained.”\textsuperscript{118} John Henry is troubled by this ruling but understands why the judge found the

\textsuperscript{115} Fed. R. Evid. 705; see Iconco v. Jensen Constr. Co., 622 F.2d 1291, 1293 (8th Cir. 1980) (ruling in construction contract case that not all facts underlying opinion of contracting expert must be brought out by proponent); Cunningham v. Gans, 507 F.2d 496, 501 (2d Cir. 1974) (reversing judgment for defendant because plaintiff was unable to elicit testimony during direct examination of expert witness due to repeated sustained objections concerning facts underlying witness’ opinion).

\textsuperscript{116} See Fed. R. Evid. 705 advisory committee’s note (providing that opponent may elicit bases of expert’s opinion on cross-examination). The advisory committee noted that those who consider it unfair to burden the opponent with the task of bringing out the basis of an expert’s opinion on cross-examination should recognize that the opponent need only bring out facts unfavorable to the witness. \textit{Id.} See International Adhesive Coating Co. v. Bolton Emerson Int’l, Inc., 851 F.2d 540, 544-45 (1st Cir. 1988) (ruling that, where plaintiff’s expert witness’ explanation of underlying documentation is brief, defendant has ample opportunity to investigate, expose, and rebut any allegedly in supportable opinions on cross-examination); Polk v. Ford Motor Co., 529 F.2d 239, 271 (8th Cir.) (holding that any weakness in underpinnings of expert’s opinion may be developed on cross-examination and will go to weight and credibility of testimony), cert. denied, 426 U.S. 907 (1976).

\textsuperscript{117} This is the fact scenario for the discussion in the short story concerning opinion testimony on ultimate issues. See Fed. R. Evid. 704(b) (prohibiting expert, testifying about mental state of defendant in criminal case, from expressing opinion as to whether defendant has mental condition constituting element or defense to crime charged).

\textsuperscript{118} 7 J. Wigmore, \textit{Evidence in Trials at Common Law} § 1921 at 21-26 (J.H. Chadbourn rev. 1978). Wigmore found the common law rule disallowing opinion testimony on “ultimate issues” to be problematic, operating chiefly to exclude necessary testimony. See \textit{id.} (stating that rule disallowing opinion testimony on every issue before jury was impractical, misconceived, and lacked justification).
question improper. In criminal matters, conclusions on state of mind when involving an element of the charge or defense are best left for the jury.¹¹⁹

John Henry is ready to move to closing arguments when his daydreaming abruptly ends. The librarian is standing over John Henry announcing that the library is closing in five minutes. "Too bad," he thought, "I am not finished. I haven't reached the end. Why can't the librarian wait for the jury verdict to come in?" There is a good side to this interruption, however, because instead of inventing a better crime novel, John Henry can check out and take home his other selection. This new thriller involves the prosecution of a serial killer!

II. CREATING SHORT STORIES: A FRAMEWORK FOR OTHER STORYTELLERS

In drafting these review narratives, I rely on fundamental drafting premises and guidelines. Although I am prone to view the creation of these short stories as an intuitive, creative process, there are nevertheless aspects of my approach which may enable others to begin the process of writing short stories for use in the classroom. Therefore, I will elaborate on how I construct the stories for those readers who also wish to be storywriters.

At the outset, I structure the doctrinal coverage of my course into segments of selected rules of law, among which I am able to draw connections. For instance, the reader will note that I combine the rules on relevant evidence with the subsequent "relevant but" rules for the first short story, Relevancy and Its Limits.¹²⁰ When I approach drafting the short story, therefore, I am limited to a finite amount of doctrine. Further, the purpose of the short story is to review the major premises and structures of the rules of law. Thus, I am lim-

¹¹⁹. FED. R. EVID. 704(b). The principle of leaving conclusions on the defendant's state of mind to the jury when involving a criminal charge or defense is the rationale behind Federal Rule 704(b). For examples of different applications of Federal Rule 704(b), see United States v. Hillsberg, 812 F.2d 328, 331-32 (7th Cir.) (excluding psychiatrist's testimony concerning defendant's capacity for specific intent required for conviction of second degree murder, and holding that such is ultimate issue for jury alone), cert. denied, 481 U.S. 1041 (1987); United States v. Edwards, 819 F.2d 262, 265-66 (11th Cir. 1987) (ruling psychiatrist's opinion, that the behavior of defendant charged with unarmed bank robbery does not necessarily indicate active manic state, is not impermissible in testimony on defendant's sanity); United States v. Gold, 661 F. Supp. 1127, 1132 (D.D.C. 1987) (holding that defendant charged with illegal drug distribution may put on expert psychiatric testimony concerning defendant's mental state or condition at time of alleged crime, but expert may not testify concerning defendant's state of mind if it constitutes element of crime).

¹²⁰. See supra notes 24-45 and accompanying text.
ited in the extent of sophisticated interpretation that needs inclusion in the story.

Next, I research the facts surrounding the setting for my short stories. I select interesting facts about Wigmore’s personal life that I think will make this scholar real in the minds of students, as well as make the reasoning processes directly inferable from the facts of the story.

In addition, I structure each story to begin with a non-legal adventure or journey. I seek to draw attention to the subject matter without separating the rules from life’s experiences. After all, it is life’s experiences which give rise to the creation of rules of law. I thus have two levels of interpretation occurring in each short story. One level of interpretation occurs in the telling of the adventure itself. The second level of interpretation occurs in the reflection on the meaning of the facts of the adventure as it relates to the Federal Rules of Evidence under review. Again, the purpose for the later level of reflection is to reinforce the fact that reasoning is a product of applying a premise or rule to an event or occurrence. To accomplish this task, I design these reflections to occur in the activities of the personal life of Wigmore. I write the story in a manner that allows the student to substitute herself for Wigmore. This transference is intended to further demystify the reasoning process.

The doctrinal coverage is designed to go from the simple to the complex aspects of the law step-by-step. The writing style is directed at oral communication. Thus, my goal is easy listening by the audience. I write, therefore, in short sentences and keep the language simple. In addition, I emphasize language of action in the review narratives to keep the students’ minds traveling with the story. This is also why I intentionally use the present verb tense, which helps to place the students in the mind of Wigmore.

Lastly, I schedule time exclusively for the drafting of the story after I teach the specific section of evidence under review. I choose this method of timing because I want the students’ participation in those particular classes to be fresh in my memory. I am sure that this backdrop influences the contours of each of the stories. Further, my attention is directed solely to the particular drafting challenge at hand. I am not distracted by the need to draft the stories yet to come.

III. STUDENT RESPONSES TO STORYTELLING

The students’ reactions to storytelling sheds light on the utility of this teaching method. Interestingly, several students whom I identi-
fied as showing difficulty in establishing a structural framework for doctrinal analysis individually requested copies of the short stories at the end of the semester to assist them in studying for the final examination. A few of the gifted students commented that they enjoyed the “puzzle-like” experience of unraveling the content of the stories. During review sessions, students referred to the short stories in discussing the answers to the multiple-choice questions. Furthermore, I received no complaint about the use of the review narratives in class. Thus, the narrative response to my storytelling reveals that it is a technique that students can use positively to reinforce structure and meaning in the study of law.