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# Evidential Completeness and the Burden of Proof

by  
DALE A. NANCE\*

In recent years, commentators have begun to take seriously the problem of missing evidence, specifically, evidence that should be presented by the parties but is not.<sup>1</sup> In a previous paper, I analyzed the considerable variety of tools employed by the law to address this problem and made some relatively modest suggestions concerning the nature and use of such tools.<sup>2</sup> In this paper, my former modesty is less evident: I develop the outlines of an explicit and practical proposal for addressing the problem.

My principal claim is that the burden of proof should reflect the need to avoid rendering a judgment on the basis of an evidentiary package that is unreasonably incomplete, completeness being measured relative to the total package of evidence that is (or should have been) reasonably available to the tribunal.<sup>3</sup> This thesis qualifies and improves the now conventional view, described in more detail in Part I, that conceives the burden of proof entirely in terms of: (a) using the burden of persuasion to optimize risks associated with alternative decisions; and (b) using the burden of production to monitor assessments of probability by the trier of fact for plausibility. More specifically, the problem of unreasonable evidential incompleteness implicates the burden of production by invoking a judicial responsibility to monitor not only the plausibility of alternative probability assessments, but also the appropriateness of *making* such a probability assessment on the current state of the evidence.

Prevailing practice confuses matters by assigning to the trier of fact too much responsibility for taking such incompleteness into account. Although this tendency is understandable, and probably does

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1. One subcategory of this problem, the destruction or suppression of evidence, has received particular attention in the literature. See, e.g., *DESTRUCTION OF EVIDENCE* (J. Gorelick et. al. eds., 1989).

2. See Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831 (1991).

3. Earlier writers have given some attention to the role of the burden of proof in regulating evidential completeness, and the present paper builds on that work, but their analyses differ considerably from mine. I note some of these contributions at relevant points *infra*.

no great harm in some cases, it is nonetheless fraught with difficulties both theoretical and practical. While most obviously problematic in jury trials, the resulting confusion affects bench trials as well.

Perhaps the best way to summarize my specific proposals is to state what I anticipate to be the probable systemic consequences of adopting them. First, it would entail a substantial *decrease* in the use of missing evidence arguments to juries and associated jury instructions. On the other hand, it would entail a modest but significant *increase* in the use of peremptory judgments, dismissals, and defaults based on the omission of evidence. It would also entail a significant increase in the *explicitness* with which courts monitor parties' choices about what evidence not to develop or not to present. Finally, and most important, cases decided on their factual merits would be more accurately decided by virtue of improvements in the evidential basis of decision.

## I. The Conventional Model of Proof Burdens

The now conventional understanding of the burden of proof is that the level or weight of the burden of persuasion is determined by the expected utilities associated with correct and incorrect alternative decisions. First clearly articulated in pathbreaking work by John Kaplan,<sup>4</sup> this view has been developed and refined by other scholars.<sup>5</sup> It has also been endorsed and applied by the Supreme Court in its due process decisions, where the Court has expressly weighed the consequences of a mistaken ruling for the plaintiff or prosecution against the consequences of a mistaken ruling in favor of the defendant or accused in deciding what standard of persuasion is constitutionally required.<sup>6</sup>

The idea can be formalized succinctly in the following way, generalizing somewhat from Professor Kaplan's treatment. Assume for simplicity that the court is called upon to make a determination of H or not-H in order to apply the substantive law in a two-party lawsuit; the plaintiff or prosecution ("π") should win if H were known to be true, and the defendant or accused ("Δ") should win if H were known

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4. See John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968).

5. See, e.g., David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487.

6. The seminal decision was *In re Winship*, 397 U.S. 358 (1970) (especially Justice Harlan's concurrence at 369-72). The framework has since been applied in cases such as *Addington v. Texas*, 441 U.S. 418 (1979); *Santosky v. Kramer*, 455 U.S. 745 (1982); and *Rivera v. Minnich*, 483 U.S. 574 (1987).

to be false.<sup>7</sup> In the actual state of uncertainty about the truth of hypothesis  $H$ , let  $\text{Pr}(H)$  represent the trier's assessment of the probability of  $H$  at the conclusion of all the evidence, and let:

$U(+)$  be the increase in utility attributable to a "true positive," a correct determination that  $H$  is true;

$U(-)$  be the increase in utility attributable to a "true negative," a correct determination that  $H$  is false;

$D(+)$  be the magnitude of the decrease in utility attributable to a "false positive," an incorrect determination that  $H$  is true; and

$D(-)$  be the magnitude of the decrease in utility attributable to a "false negative," an incorrect determination that  $H$  is false.<sup>8</sup>

Then, the net expected change in utility of a decision for  $\pi$  is just the expected gain from a true positive less the expected loss from a false positive, or

$$[\text{Pr}(H) \times U(+)] - [(1 - \text{Pr}(H)) \times D(+)],$$

while the net expected change in utility of a decision for  $\Delta$  is just the expected gain from a true negative less the expected loss from a false negative, or

$$[(1 - \text{Pr}(H)) \times U(-)] - [\text{Pr}(H) \times D(-)].$$

Thus, a decision for  $\pi$  is better than one for  $\Delta$  if and only if the former quantity exceeds the latter, or

$$\text{Pr}(H) > P^* = \frac{1}{1 + \frac{U(+) + D(-)}{U(-) + D(+)}}$$

7.  $H$  can be either a simple proposition of fact ("Defendant is the one who committed what is known to have been a murder") or a complex conjunction of elements ("Defendant was negligent and thereby proximately caused the injury to the plaintiff"). For reasons that I have detailed elsewhere, I am not persuaded that extant law founders on any significant paradox when conjunctive events are considered. See Dale A. Nance, *A Comment on the Supposed Paradoxes of a Mathematical Interpretation of the Logic of Trials*, 66 B.U. L. REV. 947 (1986). And to the extent that it does generate paradox, that may simply reflect a defect in the law that needs to be addressed. See Richard Friedman, *Answering the Bayesioskeptical Challenge*, 1 INT'L J. EVIDENCE & PROOF 276, 279-84 (1997).

8. All these changes are relative to the status quo ante, which is a state of indecision. Purists might wish to see the probability of the hypothesis expressed in conditional terms, as  $\text{Pr}(H|E)$ , where  $E$  represents the evidence in the case, but I have made the conditional nature of  $\text{Pr}(H)$  clear in the text. Also, I should note that the probability function is assumed to satisfy the traditional Kolmogorov axioms for mathematical probabilities, but how the trier of fact arrives at  $\text{Pr}(H)$  is unspecified. In other words, the model in this form does not assume Bayesian revisions of prior probabilities. See Kaplan, *supra* note 4, at 1083-91 (discussing Bayesian revisions as another aspect of a decision-theoretic approach).

Obviously,  $P^*$  varies according to the utilities involved, which are publicly determined based on the nature of the case. In particular, a relatively large decrease in utility from a false positive (as in criminal prosecutions for which  $D(+)$  is much greater than  $D(-)$  while  $U(+)$  is approximately equal to  $U(-)$ ) yields a relatively high  $P^*$ , while symmetric utilities (as in civil cases for which  $U(+)=U(-)$  and  $D(+)=D(-)$ ) yield  $P^* = .5$ .<sup>9</sup> Also publicly determined is the identity of the party to be favored in the event that the trier of fact cannot determine which is greater,  $\text{Pr}(H)$  or  $P^*$ .<sup>10</sup>

Of course, in real trials the degree of precision in the specification of  $P^*$  varies, from civil cases where the preponderance standard is sometimes, but not always, defined in terms of "more probable than not," to criminal cases in which the "beyond a reasonable doubt" standard has notoriously defied more precise definition. Although perhaps not part of the standard interpretation, it is nonetheless plausible to conceive of the formal standards of persuasion as setting limits on a range of possible values for  $P^*$ , with some degree of flexibility for the trier of fact in fixing the  $P^*$  for a particular case.<sup>11</sup> For example, under the "preponderance of the evidence" standard, one might imagine a range of permissible  $P^*$  values for the trier to adopt, say between .4 and .7; for a "clear and convincing evidence" standard, a range between .7 and .9; and for a "beyond reasonable doubt" standard, a range between .9 and 1. The ranges might also overlap.<sup>12</sup>

Once the standard of proof is determined as the critical probability  $P^*$  that must be exceeded, the principal remaining question is whether the probability of the ultimate fact in issue exceeds  $P^*$ . This,

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9. I do not mean to suggest that the typical civil case is rightly viewed as involving such symmetry, although that appears to be the general consensus. See Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J.L. & PUB. POL'Y 647 (1994) (arguing, *inter alia*, that conventional accounts of allocation and weighting in civil cases understate the role of the principle of civility, by which parties should be presumed to act in compliance with serious social norms).

10. If  $P^* > .5$ , the burden of persuasion would surely be said to rest upon  $\pi$  even if  $\pi$  is assigned the win when  $\text{Pr}(H) = P^*$  (an assignment unknown in the law). But if  $P^* = .5$ , then the burden of persuasion is on the party who is supposed to lose in the event that  $\text{Pr}(H) = P^*$ , in civil cases usually the plaintiff.

11. Professor Kaplan recognized both the existence of and the need for such flexibility, as well as the dangers thereof, at least in criminal cases. See Kaplan, *supra* note 4, at 1072-77. Cf. Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1035-36 (1977) (arguing that the "ideal juror" has no discretion in setting  $P^*$  and that any discretion inherent in the vague formulae used to instruct jurors is the source of potential prejudice in the jurors' adjustment of  $P^*$ ).

12. This would help to legitimate both the variability and the level of estimates provided by persons asked to quantify the various burdens of proof. See, e.g., Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 L. & SOC'Y REV. 319 (1971).

of course, is the central question to be answered by the trier of fact. But ancillary to this issue is one addressed by the court as a matter of law, namely whether a party has the obligation to present further evidence as to H or, in default thereof, to suffer an adverse judgment. This is conventionally identified as the "burden of production," and it can fall on either party according to the weight of the evidence at the time the decision is made.<sup>13</sup> It is usually understood as translating simply into a decision about whether, *given* the evidence before the court, a reasonable trier of fact could plausibly estimate  $P^*$  in such a way as to favor the party whose burden of production is in question.<sup>14</sup>

Although the foregoing is a powerful explanatory framework, my claim is that the burden of production should not be limited to the "plausibility" role described above.<sup>15</sup> Rather, the burden of production should also extend to monitoring the evidence for completeness, within reason. That is, the judge should determine if it is reasonable, in light of evidence *not* presented, to *decide* whether or not  $\Pr(H) > P^*$ . We already know this to be so, at least to the limited extent that the burden of production requires, for example, the introduction of *some* evidence on H even if, in the absence of any formally introduced evidence, a reasonable trier of fact could think either that  $\Pr(H) > P^*$  or that  $\Pr(H) < P^*$ . But the significance of this kind of qualification of the basic model is not fully appreciated.<sup>16</sup>

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13. See GRAHAM LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 3.1 (3d ed. 1996). So conceived, the burden of production is ancillary to the burden of persuasion in that there would be no way to give concrete meaning to the burden of production without an identified burden of persuasion. In contrast, the idea of a burden of persuasion is entirely intelligible without reference to any burden of production, as in non-adversarial systems of adjudication.

14. Over time, the law has clearly come to recognize that the measure of the burden of production, in the sense described here, is a relative concept that depends on the applicable standard of persuasion. In a criminal case, for example, the standard applicable in deciding whether the prosecution has met its burden of production is whether a reasonable juror could find the defendant guilty *beyond a reasonable doubt*. See 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 338, at 433-34 (4th ed. 1992) [hereinafter "MCCORMICK"].

15. The idea that the burden of production has a component beyond the plausibility function is not really novel. Already there are several special corroboration requirements or other specific rules about evidence that must be present to warrant judgment regardless of  $\Pr(H)$ . See JOHN W. STRONG ET AL., EVIDENCE 101 (5th ed. 1995). The exact relationship of these rules to the conventional model is usually unclear.

16. Professor Richard Friedman, in his textbook on evidence, struggles to explain this phenomenon in a way consistent with the conventional model as described in the text. RICHARD FRIEDMAN, THE ELEMENTS OF EVIDENCE 22-23 (1991). He asserts that the trier of fact cannot have an initial  $\Pr(H)$  that is greater than  $P^*$  because prior to the taking of evidence, the event alleged in the case must be considered inherently unlikely, too unlikely to exceed any standard of persuasion in use by the courts. See *id.* at 22-23. He comments parenthetically, "Of course, we may have a tendency to rate the probability significantly higher, given our knowledge that the plaintiff has brought a lawsuit alleging

I have articulated the foregoing model as a convenient reference point for the following discussion. However, I should note here that my argument qualifies other frameworks as well. In particular, my argument qualifies any theory of proof burdens that posits only arrangements for making and monitoring a comparison of  $\text{Pr}(H)$  with a fixed probability  $P^*$ , however precisely  $P^*$  is specified and whatever factors enter into such specification. Furthermore, my argument qualifies some models of proof burdens that do not involve a fixed  $P^*$ , such as the theory that the plaintiff in a civil action should win if and only if the probability that the plaintiff's story is true is greater than the probability that the defendant's story is true.<sup>17</sup> The problem of missing evidence only aggravates the major weakness of such a theory, its suppression of stories that are closer to the truth but for which neither party vouches in their pleadings.<sup>18</sup> In any event, in what follows I will refer only to the conventional model as the basis for my arguments.

## II. The Problem of Evidential Incompleteness

*Identifying the problem.* Suppose you are the trier of fact and law in a case of alleged rape. Defendant does not deny that a rape occurred, but denies that he is the perpetrator. The evidentiary package available to you includes the following: (1) unimpeached eye-witness identification of the defendant by the victim, in a police line-up as well as at trial; (2) unimpeached eye-witness identification of the defendant by a neutral third person who claims to have observed the defendant leaving the victim's apartment on the night of the rape; (3) a custodial confession by the defendant, since retracted but still admissible; (4) defendant's uncorroborated testimony that he was at home alone during the relevant time period. There is no additional evidence, beside the fact that defendant lives in the victim's neighborhood and that the rape occurred in the victim's home. Un-

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this to be true, but the allegation is not itself evidence, and should not be considered in evaluating the probability of liability." *Id.* at 23. To the fact of an allegation one should add the fact that the case has not settled before trial. These facts must certainly be known to the trier of fact, and it seems to stretch credulity to insist that a "reasonable" juror will ignore them. That does not mean that a judge should consider these facts in deciding the question of a directed verdict, but then one needs a good explanation of why the judge ought to ignore what the jury reasonably believes to be relevant. I suggest that it is because in virtually every imaginable case, no evidence on a material fact, beyond the informal evidence just mentioned, is evidence that is unreasonably incomplete.

17. See Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 405-08 (1986).

18. Moreover, for want of a specific  $P^*$ , such a theory does not offer even the possibility of making adjustments to  $P^*$  as a way of handling evidential incompleteness. The possibility of adjusting  $P^*$  to take account of missing evidence is discussed *infra* in Part V.

der these conditions, would you conclude that defendant's guilt has been proved beyond a reasonable doubt?

My answer to this question is "Yes and no." On the one hand, I would certainly place the probability of guilt under the proven facts at a very high level, above 95%. On the other hand, there has been no testimony concerning scientific evidence such as hair samples, fingerprints, or analysis of semen, evidence which one knows to be routinely and rightly sought in such cases if possible, and there has been no testimony to explain why such evidence is not available. Thus, my probability of guilt would not be as high as it would be if inculpatory scientific evidence were introduced, or if the absence of scientific evidence were plausibly explained in a manner consistent with guilt. But my probability of guilt would nonetheless be very high, and could be high enough to exceed any plausible quantitative measure of the standard of proof that is viewed as fixed for all cases of the type.<sup>19</sup>

To put the point simply, perhaps misleadingly so, *no* doubt about guilt is reasonable, no matter how small it may be, if it is the product of an unreasonably incomplete state of the evidence.<sup>20</sup> I say "perhaps misleadingly" because the "reasonable doubt" standard lends itself to such an explanation, but the same point applies in a civil case when some other standard, such as "preponderance of the evidence" or "clear and convincing evidence," is employed. Indeed the point is quite independent of the required standard of persuasion. Thus, in the civil context, no doubt about whether the defendant committed a tort or a breach of contract is acceptable if it is the product of an unreasonably incomplete state of the evidence.

*Articulating a criterion.* These intuitively plausible claims can only be made good if the notion of unreasonably incompleteness is adequately articulated. Under what conditions, then, is the package of evidence to be considered *unreasonably incomplete*? Evidence is unreasonably incomplete if and only if either of two conditions is met: (1) there exists admissible evidence that can be obtained for use

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19. The example I have chosen involves missing scientific evidence, but the same analytical problem could arise in other contexts, for example, if the evidence that is missing is the testimony of someone who could be expected to have been an eye-witness. See, e.g., David H. Kaye, *Do We Need A Calculus of Weight to Understand Proof Beyond a Reasonable Doubt?*, 66 B.U. L. REV. 657, 663 n.16 (1986) (describing a news reporter's interview with jurors, one of whom asked rhetorically during deliberations why the defendant did not call as a corroborating witness someone whom the defendant mentioned during his testimony).

20. See *id.* at 663-64 (recounting a jury's acquittal on grounds of reasonable doubt due to the prosecution's failure to present "breathalyzer" evidence). Professor Kaye rightly notes that it can be difficult to know in such cases whether the acquittal stems from a judgment that, because of the omission,  $\Pr(H) < P^*$ , or from a judgment that the prosecution should lose because of the omission even though  $\Pr(H) > P^*$ . See *id.* at 664 n.17.



in the trial without an expenditure of resources that is unreasonable (in light of the nature of the controversy and the significance of the evidence), the non-presentation of which is not excusable under a rule of privilege or pursuant to some legitimate consideration other than obtaining a tactical advantage in the case (a "reversible deficiency"); or (2) evidence that would have satisfied (1) has been caused not to by the faulty conduct of a party or of persons, such as counsel, whose conduct may rightly be attributed to a party (an "irreversible deficiency by fault").<sup>21</sup> The rape case hypothetical described above might involve either type, depending on whether the scientific evidence is still reasonably available and, if not, whether it would have been reasonably available had the parties acted properly.

The most immediate consequence of my criterion is that a loss of evidence that is both irreversible and the result of accident, or of conduct not attributable to a party, does not render the package of evidence *unreasonably* incomplete. For example, in the rape hypothetical, the victim, in a state of such disorientation or fear as to preclude a finding of fault, might have destroyed a semen sample before the police were able to collect it. Or the police van might have been involved in a freakish accident, losing irreplaceable physical evidence despite all reasonable precautions. Such deficiencies are the fortuities of legal life, subject to which the parties must litigate and the trier of fact must make a decision, no less so than the fact that certain imaginable evidence was never available at all. Of course, if the result of such a party-innocent and irreversible deficiency is that the evidence is insufficient to warrant a finding by the appropriate standard of persuasion, then a directed verdict is appropriate. But that is distinct from the issue being addressed here. That is, evidence can be insufficient even if it is reasonably complete. To put the matter succinctly, evidential sufficiency, that which properly allows the case to go to verdict, entails both (1) plausibility of alternative results under the burden of persuasion, given the evidence, and (2) reasonable completeness of the evidence.<sup>22</sup>

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21. For now, the reader should understand "faulty" conduct as including both acts intended to deprive the court of evidence and acts negligently causing the loss of evidence. Mere omissions—failures to act—that cause irreversible loss of evidence will generate unreasonable incompleteness only if there was a duty to collect or preserve the evidence in question. This is a difficult matter about which I offer no opinions here except to note that the most plausible non-contractual duty of this sort applies to the prosecution in criminal cases. See, e.g., *Arizona v. Youngblood*, 488 U.S. 51 (1988) (addressing the "bad faith" standard to be employed in due process challenges based on the prosecution's failure to collect and preserve evidence). In the context of reversible deficiencies, however, such an affirmative duty to act can arise simply by virtue of judicial recognition of the need for the evidence in question.

22. Jonathan Cohen made a similar point in the context of criminal trials:

Of course, *determining* whether evidence is unreasonably incomplete entails not only factual judgments and judgments of potential admissibility, but also a judgment of importance. For example, the presented evidence is not unreasonably incomplete when the missing evidence, though readily available, is merely cumulative or relates only to an uncontroverted point, or when the missing evidence is the potential testimony of a wholly unreliable person. Beyond that, the omission of evidence should be excusable if it is unlikely that its presentation would change the result under the applicable standard of persuasion, assuming its content to be as favorable to such a change as is plausible.<sup>23</sup> In an adversarial system, these determinations, whether made by judge or jury, must rely to a considerable extent on information supplied by the parties as to both the nature of the potential evidence and why it has not been presented.<sup>24</sup>

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[T]he standard of proof that has to be met is satisfied only by what it would be reasonable to regard as a maximization of weight . . . .

. . . [T]he weight of the evidence obtained is being assessed by comparison with the supposed totality of relevant facts . . . . So, even if we had all the *available* evidence, our argument might still not have maximal weight. Sometimes the prosecution cannot prove guilt beyond reasonable doubt because some crucial issue happens in practice to be undeterminable.

L. Jonathan Cohen, *The Role of Evidential Weight in Criminal Proof*, 66 B.U. L. REV. 635, 640, 642 (1986). Superficially, this might look like the *same* point I make in the text, but since Professor Cohen explicitly rejects the  $\text{Pr}(H) > P^*$  formulation of the burden of persuasion, it is clear that he claims that conviction can be unwarranted because of a lack of evidence even if all reasonably available evidence has been considered *and*  $\text{Pr}(H) > P^*$ . Furthermore, it appears from his discussion that this is not because evidence that once was reasonably available has become no longer so due to governmental misconduct. See *id.* at 642 (basing the comment quoted above on the hypothetical that "a vital eye-witness has died without ever disclosing what he saw," but giving no indication that the death was due to the wrongdoing of a party). But why extant (or once extant) but now innocently unavailable evidence should be treated differently from never extant evidence is not explained. Professor Cohen refers to the necessary maximal weight being that which arises from having the "*totality* of the relevant facts," *id.* at 636, but he fails to explain how to draw a meaningful stopping point between the totality of reasonably available evidence, on the one hand, and plain certainty, on the other.

23. This might seem to conflict with my claim that the matter of evidential completeness is independent of the standard of persuasion. What I mean here is that it is *not* independent of the difference between  $\text{Pr}(H)$  and  $P^*$  at the time when the determination about completeness is made.

24. The determination is thus roughly analogous to deciding whether error in the exclusion of evidence has been harmless. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.7 (1995). The main difference is that harmless error is generally, though not invariably, judged in the context of erroneously admitted evidence or an offer of proof for erroneously excluded evidence, so that the appellate court has a particularly good sense of the nature of the evidence at issue. See FED. R. EVID. 103(a), (d). In the present context, to be sure, indications of the nature of the foregone evidence, such as the deposition of a witness that neither party calls, can be made available to the trial judge (or jury) deciding in the first instance whether the evidence is reasonably com-

One might quibble with my criterion of unreasonableness, calling for adjustments in the arguments below. But for now, the important question is, given a suitable criterion of unreasonable incompleteness, if you agree with me about my responses to the hypothetical or can imagine a case in which you would reach the same set of judgments, what should the law do in response?

*The need to respond.* The answer obviously depends on context and alternatives. In an adversarial system, irreversible deficiencies by fault are certainly subject to penalties of various sorts, from discovery sanctions, to spoliation inferences at trial, to separate actions in tort, but still lacking is an adequate theory of how best to integrate these various responses. With regard to reversible deficiencies, there is certainly reason to doubt that further official responses to incompleteness are even necessary. The thoroughness with which adversaries investigate cases is often and rightly viewed as both a strength and, in the case of excessive investigation or discovery, a weakness of the common-law system of adjudication. Given such discovery, and the sanctions necessary to enforce it, one may plausibly conclude that if evidence is valuable and reasonably available, then the party it favors will have adequate incentive to acquire and introduce it. If it does not favor either side, then it is irrelevant and superfluous. And if it is relevant but too expensive or even impossible to obtain, then again non-presentation is perfectly appropriate.

I agree with this view as a general proposition, both as to the positive and negative aspects of adversarial litigation. Nevertheless, there are occasions on which an adversarial system, or at least *our* adversarial system, fails to produce a suitably complete evidentiary package, not only because of irreversible deficiencies by fault, but also because of reversible deficiencies. Cases like the rape hypothetical with which I began my discussion do arise, and sometimes they involve reversible deficiencies.<sup>25</sup> Comparable civil cases also appear in the reports.<sup>26</sup>

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25. See, e.g., *People v. Park*, 380 N.E.2d 795 (Ill. 1978) (affirming reversal of a conviction for insufficiency of evidence despite what should have been considered convincing evidence of guilt, emphasizing the ready availability of highly probative scientific evidence not presented in the case). See also *United States v. Hart*, 546 F.2d 798, 799 (9th Cir. 1976) (applying rule that upon demand of defendant, prosecution must produce a material witness-informant who is reasonably available); *G.E.G. v. State*, 417 So. 2d 975, 977 (Fla. 1982) (holding that upon demand of a defendant charged with possession, the prosecution must introduce the controlled substance if it is available); *People v. Tann*, 40 N.W.2d 184, 186 (Mich. 1949) (reversing conviction for prosecution's failure to call eye-witness, but not addressing whether the jury could reasonably have found that the evidence satisfied the burden of persuasion without that witness).

26. In civil cases, judicial concern about evidential completeness is particularly likely

To be sure, it is often difficult to discern in these cases exactly *why* the adversarial incentives failed to generate a complete evidentiary package, at least when the missing evidence is still reasonably available at the time of trial. But it is not difficult to identify general sources of incompleteness beyond the obvious incentives to destroy or suppress evidence. They include: lack of diligence of counsel; differences of opinion (between counsel and court) about whether particular evidence is sufficiently probative to justify the expenditures associated with obtaining and presenting it; defects in the system of pretrial discovery that prevent the party favored by given evidence from obtaining it; and asymmetries in exclusionary rules that prevent only the party favored by the evidence from presenting it.<sup>27</sup>

Of course, whether these gaps call for a legal response of some sort depends in part upon how important one considers accuracy of adjudication. While it is clearly very important in criminal cases, one can anticipate arguments that accuracy is of less importance in civil cases compared, for example, to the goal of resolving disputes. I cannot enter that debate here. It suffices to say that my analysis presupposes that accuracy of adjudication is very important *at trial*, even in civil cases. I can see no other coherent way to interpret the role of adjudication in a system of laws, what we ask the trier of fact to do within that system, or the evidentiary rules that we employ in assist-

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to surface in a procedural way that tends to conceal its importance. See, e.g., *Linkhart v. Savely*, 227 P.2d 187, 192 (Or. 1951), in which the court used a strange reading of pleading requirements in order to exclude plaintiff's testimony about sight-impairment, conspicuously taking judicial notice of more accurate scientific evidence readily available to plaintiff but not presented in court. And, as in many criminal cases, even when the court is expressly concerned about completeness, it is sometimes difficult to discern whether the court's response is attributable to a conclusion that because of the omission (a jury could only reasonably conclude that)  $\text{Pr}(H) < P^*$ , or attributable to a need to respond to the omission even though (a jury could reasonably conclude that)  $\text{Pr}(H) > P^*$ . See, e.g., *Hirst v. Gertzen*, 676 F.2d 1252, 1259-60 (9th Cir. 1982) (holding plaintiff's evidence of discriminatory jury selection insufficient because of plaintiff's failure to present readily available analysis of records of jury selection); *Galbraith v. Busch*, 196 N.E. 36, 38-39 (N.Y. 1935) (holding that plaintiff in car accident case failed to meet the burden of proof by not calling nominal defendants, who were in fact aligned with plaintiff and who were in the best position to know the cause of the accident); *Warren v. Jeffries*, 139 S.E.2d 718, 720 (N.C. 1965) (noting plaintiff's failure to inspect condition of car involved in accident in ruling evidence of negligence insufficient).

27. See Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 263-70 (1988). In his recent book, Professor Damaška also argues that the polarization inherent in adversarial methods causes underutilization of evidence possessing weak but not insignificant probative value. See MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 98-100 (1997). On the problem of asymmetric exclusionary rules, and the doctrine of completeness that has arisen to handle many aspects thereof, see Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825 (1995); Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 TEX. L. REV. 51 (1996).

ing the trier in its task.<sup>28</sup> In any event, the judgment of importance that is involved in deciding whether evidence is unreasonably incomplete should be sensitive to the relative importance of accuracy in the particular context.<sup>29</sup>

*Wrongful destruction of evidence by a non-party.* As I have characterized unreasonable incompleteness, wrongful destruction of evidence by a person whose conduct is not attributable to a party does not render the evidence unreasonably incomplete any more than would evidence destruction that is entirely innocent. In other words, whatever "wrongfulness" means in such a context, neither wrongful nor faultless destruction of evidence by a non-party implicates the burden of production except insofar as the effect of the loss, regardless of its cause, is to render it implausible to believe that  $\Pr(H) > P^*$  given the evidence that is introduced.

Nonetheless, wrongful destruction of evidence, which in the context of a non-party is most likely to be the result of negligence, should not be free of legal consequences, *damnum absque injuria*. I can see no good argument that negligent damage to a legal claim or defense is less important than, say, negligent destruction of physical property of comparable value. Proof problems generate the principal argument against tort liability to the affected parties.<sup>30</sup> Despite proof problems, there is substantial law supporting liability under the tort of evidence spoliation, although there continues to be disagreement over whether liability should be imposed for mere negligence and over the precise measure of recovery.<sup>31</sup> In any event, my concern is with the relationship between missing evidence and the burden of proof in the underlying litigation, and non-party destruction, whether faulty or not, is no different in this regard than purely accidental destruction by a party.

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28. See generally Nance, *The Best Evidence Principle*, *supra* note 27.

29. In order to avoid misunderstanding, I should also note that I do not claim that problems of unreasonable evidential incompleteness are increasing in frequency or importance. My concern is how to deal with the problem when it arises, however rare that may be. Of course, one could argue that if the rate of incidence of this sort of evidentiary deficiency is extremely low, then it is not worth the time and effort to develop and, more important, to implement a comprehensive system of response. But the existence of many rules and cases that address incompleteness, albeit unsystematically, indicates that the problem deserves more systematic treatment.

30. The question is addressed at length in a recent article by Ariel Porat and Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1899 (1997), and I will do no more here than indicate general agreement with their argument in favor of monetary liability for evidential damage to civil claims. In accord with much developing law, Porat and Stein also argue in favor of applying such a tort remedy in the context of evidential damage *by a party*. I reject that idea for reasons stated *infra* in Part IV.

31. See generally DESTRUCTION OF EVIDENCE, *supra* note 1, at §§ 4.1 -23.

### III. Why Discounting by the Trier of Fact is Inadequate

One oft-employed solution to the problem of evidential incompleteness is to leave the matter to the good judgment of the trier of fact in ascertaining  $\text{Pr}(H)$ . The trier of fact (whether judge or jury) can and will "discount" the probability of the ultimate fact at issue in light of the absence of evidence, at least so long as that absence is noticed by the trier *sua sponte* or brought to the trier's attention by arguments of counsel.<sup>32</sup> In my rape hypothetical, for example, the trier of fact can adjust the probability that the defendant is the perpetrator according to the inferences to be drawn from the fact that neither the prosecution nor the defense has presented the scientific evidence or an explanation for its absence. Thus, it may be argued, while my judgment puts the probability of guilt above 95% based solely upon the evidence actually presented in the case, once I take into account the additional item of evidence, consisting of the failure to present the missing evidence or explain its non-presentation, then my judgment of the probability might drop to something below 95%, and that can explain my verdict of not (proven) guilty.<sup>33</sup> Of course, a similar adjustment is possible in civil cases.<sup>34</sup>

There can be no doubt that this sort of thing happens. Indeed, it is fair to say that jury discounting is most frequently the remedy of choice under current practice.<sup>35</sup> In the following paragraphs, however, I survey several problems that affect the suitability and adequacy of relying on this remedy. Lest the reader suspect a hidden "anti-jury" agenda here, I hasten to add that my skepticism about relying on jury discounting does not derive from doubts about the competence of lay juries. The arguments canvassed below are equally applicable to a judge or even a panel of experts sitting as the trier of fact. The source of the identified difficulties is the distinct role that we assign to the trier of fact, not the characteristics of the

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32. I shall use the term "discounting" generally, even though in some cases the jury would obviously *increase* what would otherwise be  $\text{Pr}(H)$  on account of the omission. Also, references to the "jury" should be understood as referring to the judge when acting as trier of fact, unless the context indicates otherwise.

33. The most concise description of this effect is provided in Kaye, *supra* note 19.

34. This has been much discussed in the context of so-called "naked statistical evidence" cases, the argument being that  $\text{Pr}(H)$  might be adjusted downward, with a result favoring the defense, because such evidence is almost never the only available evidence. See, e.g., Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439, 454-62 (1986) (discussing the famous "Gatecrasher Paradox").

35. See, e.g., Richard Friedman, *Dealing With Evidentiary Deficiency*, 18 CARDOZO L. REV. 1961, 1963-65 (1997) (arguing that relying on jury inferences is probably the "most common and useful response of the legal system to the problem of evidentiary deficiency").

person or persons we choose to fill that role. Indeed, my arguments should be understood as indicating a need to *protect* the jury from being asked to perform functions incompatible with its ostensible role.

*The problem of incentives.* The most that a trier of fact may do, at least legitimately, is to render a verdict on the underlying claim that is contrary to what it would have determined had the evidential omission not been taken into account. For a narrowly instrumental litigant who is likely to lose anyway, the risk of detection and adverse verdict may constitute little disincentive to suppress evidence. The point is entirely analogous to the problem of using purely compensatory remedies under substantive law.<sup>36</sup> It means that distinct punitive responses of some sort are required in order to control such instrumentalism among litigants and their attorneys. These responses are usually beyond the scope of a jury's legitimate decisionmaking in the underlying litigation.<sup>37</sup> This problem is at least addressed by present criminal law governing obstruction of justice as well as the availability of punitive damages under the relatively new spoliation tort. Without some such measures, extrinsic to the question of inferences on the merits of the underlying claims, significant incentives to suppress evidence would remain, and accuracy would be adversely affected, especially when the resulting suppression goes undetected.

*The problem of incomplete substitutability.* Even if we limit attention to cases in which the evidential deficiency is identified by the court, there is no guarantee that in every such case discounting will change the result that would otherwise be reached under the measure of  $P^*$  that has been legally fixed. Of course, it is not inevitable that such a change *should* occur, if "should" is measured relative to the

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36. See Nance, *supra* note 2, at 874-75. For a systematic examination of the amoral litigant's incentives in civil litigation, arguing that much more vigorous legal responses to evidence destruction are needed, see Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793 (1991).

37. There can be little doubt that juries sometimes render illegitimate punitive verdicts. For example, if punitive damages are otherwise at issue in the case, it is possible for the trier of fact to take into account a defendant's conduct in regard to evidence, as distinct from the defendant's conduct which led to the litigation, when setting an appropriate punitive award. Of course, it is procedurally improper for the jury to consider conduct that is not the subject of the pleadings in determining the amount of punitive damages, and if the pleadings are amended, it would have to state a cause of action for spoliation of evidence as a distinct tort. But courts sometimes go to great lengths to support the jury's efforts to deter suppression. See, e.g., *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 344 (Ohio 1994) (holding that punitive damages are appropriate in a case of intentional alteration or destruction of medical records in malpractice action despite the fact, emphasized by the dissent, that a cause of action in spoliation had not been formally pleaded or submitted in the jury's charge).

result that would occur under reasonably complete evidence. Even a suppressor of evidence can be in the right on the underlying claim; indeed, given the variability of inferences, suppressed evidence might actually be favorable to the suppressing party in the eyes of the trier of fact. But without the missing evidence, the trier of fact is guessing. The result in some cases will be changed; in others, not. The same would be true if the missing evidence were presented, but the cases in which the change in result would occur will surely not match exactly the cases in which discounting changes the result. In other words, discounting by the trier of fact is an epistemic substitute for the missing evidence, one that is inherently inferior, to be used only when and because necessary. Before embracing it, one must be sure that better solutions are not available.

One application of this point that has been noted in previous literature is that in some cases the discounting might apply just as well to either side of the dispute. That is, it might be impossible in a particular case to say whether the fact of omission counts against  $\pi$  or against  $\Delta$ . My rape hypothetical tends to conceal this possibility because there is little doubt in that case that the omission should "count" against the prosecution. Perhaps the most likely candidate for such "symmetric" discounting is the failure to call a neutral witness readily available to each side, especially in a civil case. In any event, there will surely be such cases, and when they arise, no discounting will be warranted.<sup>38</sup> Yet some response to the incompleteness of the evidence will often be appropriate. This is not only because of the greater confidence that further evidence would give the trier of fact as to its decision, but also because the result could be affected by the presentation of the missing evidence. In other words, one consequence of incomplete substitutability is that the symmetric discounting that occurs in ignorance of the exact content of the missing evidence does not necessarily reflect the probative value of the evidence if it were available to the trier of fact.<sup>39</sup>

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38. See, e.g., *State v. Brewer*, 505 A.2d 774 (Me. 1985) (barring the use of adverse inferences for failure to present evidence in the context of a case in which a missing witness appeared to be readily available to both sides and the tenor of his testimony could not easily be guessed).

39. Professor Brilmayer suggests the possibility of dismissing a civil case based on "naked statistical evidence" because such evidence is incomplete, even though the probability of the plaintiff's claim being true remains greater than  $P^*$  after symmetric discounting for the omission. Lea Brilmayer, *Second-Order Evidence and Bayesian Logic*, 66 B.U. L. REV. 673, 681-85 (1986). But she denies, or ignores, the possibility that insisting on further evidence will change the result in such a case. See *id.* at 674-81. Thus, she misleadingly concludes that

[t]he costs [of insisting on additional evidence] are justified by collateral values about weight and quality of evidence, and not by improved accuracy in the lim-



*Cost conditions and incompleteness.* Symmetrical discounting is not inevitable, however. This can be seen by examining the cost conditions under which an adverse inference is appropriate. By comparing these cost conditions with the more general conditions indicative of unreasonable evidential incompleteness, one can further demonstrate the need for alternative responses to incompleteness and articulate a framework within which to analyze them.

Suppose that, from the public point of view, the amount or nature of the controversy warrants the consideration of potentially relevant evidence  $\varepsilon$  if the cost of acquiring it does not exceed  $C^*(\varepsilon)$ . Often the cost of acquiring and presenting evidence will vary depending upon who gathers and presents it. Call the cost to  $\pi$  of presenting  $\varepsilon$   $C_\pi(\varepsilon)$ , and the cost to  $\Delta$   $C_\Delta(\varepsilon)$ .<sup>40</sup> If this evidence is not presented, under what cost conditions is it appropriate to conclude that the evidence is unreasonably incomplete, and under what cost conditions is it appropriate for the trier of fact to discount the other evidence to reflect the incompleteness?

First, under what conditions will a *reversible* loss of evidence be unreasonable? A reversible deficiency is unreasonable because the significant but missing evidence is reasonably available to one or both of the parties. Such cases can be divided into three distinct categories: (1) the missing evidence is reasonably available to  $\pi$  but not  $\Delta$ , i.e.,  $C_\pi(\varepsilon) \leq C^*(\varepsilon)$  but  $C_\Delta(\varepsilon) > C^*(\varepsilon)$ , (2) the missing evidence is reasonably available to  $\Delta$  but not  $\pi$ , i.e.,  $C_\pi(\varepsilon) > C^*(\varepsilon)$  but  $C_\Delta(\varepsilon) \leq C^*(\varepsilon)$ , or (3) the missing evidence is reasonably available to both  $\pi$  and  $\Delta$ , i.e.,  $C_\pi(\varepsilon) \leq C^*(\varepsilon)$  and  $C_\Delta(\varepsilon) \leq C^*(\varepsilon)$ .<sup>41</sup> On the other hand, an adverse inference against a party properly arises only if the missing evidence could be presented at reasonable cost by that party. Thus, an adverse inference should arise against  $\pi$  only if the first of the three conditions is met, and an adverse inference should arise against  $\Delta$  only if the second is met.<sup>42</sup> But what about cases of the third type?

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ited Bayesian sense.

*Id.* at 685.

40. These are the direct financial costs, inconvenience, and difficulty of obtaining and presenting the evidence as well as the legitimately considered costs that presenting the evidence would impose on third parties. Specifically not included is any estimate of the "cost" to the party in terms of its effect upon the likelihood of winning the present litigation.

41. It may also be reversibly incomplete if the cost of judicial acquisition of the evidence, for example by judicial calling of witnesses, is less than  $C^*(\varepsilon)$ . But in an adversarial system that is not geared up for judicial investigations, we may reasonably assume that judicial acquisition costs will be no smaller than the smaller of  $C_\pi(\varepsilon)$  and  $C_\Delta(\varepsilon)$ .

42. See, e.g., 3 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.16 (4th ed. 1987) (setting forth civil jury instruction concerning missing evidence):

If a party fails to produce evidence which is under his control and reasonably

When missing evidence is reasonably available to both parties, thus creating a problem of symmetric discounting, one might draw adverse inferences as to both parties, but what would be the point? The solution that is suggested by some authorities is that the adverse inference should be drawn against the party to whom the evidence is *relatively* more accessible.<sup>43</sup> But a party's decision whether to present evidence will be affected by how much it helps that party and how much it costs, not by the fact that it is more or less expensive for that party to produce the evidence than it would be for an adverse party.<sup>44</sup> So the suggested solution embraces a totally different theory. The conspicuous explanation is that it attempts to secure the presentation of the evidence at minimal cost, regardless of the inferences to be drawn from the omission. Thus both truth-finding and efficiency are supposed to be served, but *not* by rationally adjusting  $\Pr(H)$ . Since determining  $\Pr(H)$ , and comparing it with  $P^*$ , is the nominal role of the trier of fact, the suggested solution may well be the right idea, but it is employed in the wrong context.

Second, under what conditions of cost will an *irreversible* loss of evidence be unreasonable? The loss of evidence is irreversible if and only if, at the time when the issue is raised in court,  $C_\pi(\epsilon) > C^*(\epsilon)$  and  $C_\Delta(\epsilon) > C^*(\epsilon)$ ; it is problematic only if at some earlier time at least one of these conditions was not true and that situation has changed as a consequence of faulty conduct by one or both parties.<sup>45</sup> Under these

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available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.

Actually, there will be situations meeting the first condition in the text when, nonetheless, an adverse inference against the  $\pi$  would be hostile to accuracy (and similarly as to adverse inferences against the  $\Delta$  under the second condition): Even though  $\epsilon$  may *favor*  $\pi$ , its probative value may be low enough that  $\pi$  is unwilling to incur  $C_\pi(\epsilon)$  in order to present it.

43. See *Graves v. United States*, 150 U.S. 118, 121 (1893) (disapproving prosecution's comment on defendant's failure to produce defendant's wife for possible identification, but noting that failure to produce a competent witness "peculiarly available" to one side raises a presumption that the testimony would be unfavorable to that side); 1 EDWARD J. DEVITT ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 14.15 (4th ed. 1992) (setting forth instruction for criminal trials that apparently contrasts "peculiarly available" with "equally available"); 3 DEVITT ET AL., *supra* note 42, § 72.15 (setting forth similar instruction for civil cases). See also Friedman, *supra* note 35, at 1963 (endorsing adverse inferences against the party who presumably was in the better position to produce the evidence).

44. See MCCORMICK, *supra* note 14, § 264, at 463-64 (articulating the standard for availability of the adverse inference in terms of one party's "exclusive control" over the missing evidence).

45. Of course, it may not be *impossible* to retrieve the lost evidence in such a case; either  $C_\pi(\epsilon)$  or  $C_\Delta(\epsilon)$  could be high (higher than  $C^*(\epsilon)$ ) but not infinite. If a party's conduct is particularly egregious, the judge might be tempted to take steps designed to compel the party to retrieve the evidence even at a cost greater than the  $C^*(\epsilon)$  that would ap-

conditions, however, it is reasonable to make an adverse inference against one of the parties, the party at fault in causing the deficiency to become irreversible, only when that party acted in bad faith, that is, with the intent to deprive the tribunal of evidence. Only then is there reason to believe that the evidence suppressed would have been unfavorable to the suppressing party.<sup>46</sup>

Yet a party's *negligent* destruction of evidence, while not as serious as its intentional cousin, is still a real problem. And it can render the evidence unreasonably incomplete even though no adverse inference is appropriate. The lack of probative value in the destruction does not necessarily mean that the loss of evidence should be without consequences. Such consequences are necessary in terms of protecting the truth-finding function of the adjudicative process in the long run.

*Improper discounting.* The previous paragraphs have identified situations in which a legal response to incompleteness is appropriate, but jury discounting is not. Jury discounting in such cases will be beneficial, if it is, only by accident. Negligent destruction cases are obvious examples. In other contexts, such as willful evidence destruction, jury discounting is an appropriate but inadequate response. But it is important to note conversely the danger that jury discounting will take place when *no* legal response to the incompleteness is appropriate.

For example, the jury may think discounting is appropriate because they are not provided the information necessary to realize that it is not. This may arise simply because the parties do not anticipate the evidence about which the jury will suspect impropriety. In the rape hypothetical presented earlier, the jury might be suspicious that no fingerprint evidence was presented and be inclined to infer that the prosecution has reason to believe that the defendant was never in the complainant's home. The prosecution might be able to explain this omission easily, in a way that does not suggest the defendant's innocence, but it does not anticipate the jury's concern. As long as trial procedures do not facilitate dialogue with the trier of fact in order to clear up such matters, improper discounting can impair the accuracy of adjudication.<sup>47</sup>

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ply if the suppression had been less reprehensible. In other words,  $C^*(\epsilon)$  might be considered to be a variable that depends on how the evidence came to be incomplete. In my view, that is unwise. As will be developed in the following section, it is better to summarily grant judgment against the party who committed such suppression than to force expenditures not warranted by the nature of the controversy itself.

46. See MCCORMICK, *supra* note 14, § 265, at 465.

47. In a recently published dialogue about juries, George Fisher, a former prosecutor now teaching at Stanford, responded to a question about jury error with the following pertinent anecdote:

*Implications.* The inadequacies of any theory or practice that would rely exclusively or predominantly on jury discounting to deal with evidentiary incompleteness reflect the fact that there is a concern distinct from making the best decision under uncertainty when a decision must be made. There is the analytically prior question of *whether* a decision on the merits (that is, as to whether  $\text{Pr}(H)$  is greater than  $P^*$ ) should be made on the present state of the evidence.<sup>48</sup> The primary responsibility for addressing this question must lie with the trial judge. And to the extent that steps taken by the trial judge to address this concern are effective, the discounting response is rendered unnecessary and potentially counter-productive.

#### IV. Implementing Judge-Centered Responses

If the judge is to be involved more directly in monitoring for completeness of evidence, how should this be done? In other words, once the judge determines that the evidence is unreasonably incomplete, so that a decision on the factual merits should not rationally be made on the present state of the evidence, what judicial response is optimal? There are several devices available to the trial judge for dealing with deficiencies in the evidence. Putting them together in the optimal way is a difficult problem of institutional design.

*Reversible deficiencies.* In the context of a reversible deficiency in the evidence, the primary goal should be to obtain the missing evidence for consideration by the trier of fact at minimal cost. Secondary objectives would be to deprive a wrongdoer, if any, of the benefit of the wrongdoing and to compensate the adverse party for any costs imposed thereby. With these goals in mind, consider the prin-

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Juries certainly can get the facts wrong. One of my colleagues, for example, prosecuted a serial rapist. There were several identifications of the defendant, but the jury still acquitted him. It apparently got stuck on the absence of any evidence about the rapist's fingerprints on one victim's raincoat. Of course, you generally don't get fingerprints from a raincoat, but a prosecutor constantly has to be on the alert for the one thing that a jury might seize on to acquit a defendant.

This is my paradigm of a wrong verdict: a decision to acquit based on non-evidence in the face of a lot of direct evidence of guilt.

*Juries on Trial*, 52 STANFORD LAWYER 16, 17-18 (Spring 1998). For a theoretical treatment emphasizing this kind of problem, see Dennis Lindley & Richard Eggleston, *The Problem of Missing Evidence*, 99 LAW Q. REV. 86 (1983).

48. To return to the conventional model, Professor Kaye correctly noted: "The decision-theoretic analysis focuses on what actions should be taken under risk. It presumes that action must be taken (a verdict must be returned), and it prescribes a rule for doing so that minimizes the expected losses from erroneous verdicts." Kaye, *supra* note 19, at 669. Further, Kaye recognizes that preemption of such "action" by the trier of fact may be necessary in at least some contexts on account of evidential incompleteness. See *id.* at 664 n.17.

cial tools that can be brought to bear.

The judge might initiate inquiry directly by calling and interrogating witnesses. But this solution is problematic: Rejection of this manner of proof is the principal distinguishing feature of the adversary system, with its emphasis on litigant autonomy; and even limited use of such powers, though permissible under the rules of evidence,<sup>49</sup> is rife with difficulties concerning the suggestion of judicial bias, especially in jury trials.<sup>50</sup> It is also probable that such judicial inquiries, in a system not designed for them as a regular part of the adjudication of disputes, will be inefficient solutions relative to responses that act more passively by putting pressure on the parties to present a complete package of evidence. To avoid such comparatively active intervention, the common law has evolved two other principal ways for the trial judge to handle incompleteness within the confines of the same litigation, besides simply encouraging adverse inferences with the use of jury instructions.

The more common of these is the use of exclusionary rules. I have argued extensively elsewhere that the function of exclusionary rules is often to encourage the presentation of probative evidence presumably available to the party whose evidence is excluded, rather than to prevent misdecision because the excluded evidence is somehow tainted.<sup>51</sup> While both relatively passive and reasonably effective, this device is not without its limitations and problematic implications. If the probative value of the excluded evidence is largely independent of the preferred evidence, or the excluded evidence is evidence that the trier of fact reasonably expects would be presented in the ordinary case, then exclusion is likely to operate in an arbitrary way, severely distorting the inferences to be drawn by the trier of fact.<sup>52</sup> Consequently, exclusionary responses have been invoked most commonly when the excluded evidence is epistemically redundant to, or derivative of, the evidence in preference for which the exclusion operates. Classic examples are the rules requiring that testimony be given under oath and subject to cross-examination, as well as the

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49. See, e.g., FED. R. EVID. 614, 706.

50. See, e.g., *United States v. Karnes*, 531 F.2d 214 (4th Cir. 1976) (reversing conviction when trial judge had called witnesses). See generally Stephen Saltzburg, *The Unnecessarily Expanding Role of the Trial Judge*, 64 VA. L. REV. 1 (1978) (emphasizing the importance of judicial passivity).

51. See generally Nance, *The Best Evidence Principle*, *supra* note 27.

52. On the former problem, see, for example, *State v. Langlet*, 283 N.W.2d 330, 333 (Iowa 1979) (holding that even a spoliator may not "be deprived of his legal rights by the exclusion of other and totally independent evidence"). On the latter problem, see Stephen Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011 (1978).

original document rule and the hearsay rule.<sup>53</sup> By modest extension, exclusionary responses, at least those of a conditional character ( $E_1$  is excluded if, but only if,  $E_2$  is not introduced) can be useful when the excluded evidence, though not itself redundant or derivative, is rendered misleading or of little probative value without the preferred evidence.<sup>54</sup>

Even expansive readings of the role of exclusionary rules in assuring evidential completeness will not cover anywhere near every problem.<sup>55</sup> So consider an alternative response suggested by the rape hypothetical with which we began. It is to render a conclusive ruling on a matter of fact affected by the incompleteness. This can take a number of different forms, ranging from a rebuttable presumption about the content of the missing evidence to a directed verdict, dismissal, or default on the whole of the case. Under my proposal, what these devices have in common is that the judge, without involving the jury at all, makes the determination about whether the evidence is unreasonably incomplete and, upon a positive finding to that effect, renders a preemptive determination of fact.<sup>56</sup> Whether called a presumption, a directed verdict, a discovery sanction, or something else, it should operate only after the party to be adversely affected has had a reasonable opportunity to obtain and present the evidence in question.

At first blush, it would seem that the preempted fact might be evidentiary, such as the fact that the missing witness would have testified that the defendant ran the red light, or it might be ultimate, such as the fact that the defendant ran a red light. But to employ a preempted fact that is purely evidentiary is to invite artificiality in fact-

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53. See Nance, *The Best Evidence Principle*, *supra* note 27, at 248-53, 270-78.

54. This phenomenon is often mislabeled "conditional relevance." See generally Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447 (1990); Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH. L. REV. 439 (1994).

55. This is vividly illustrated by the case of *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993) (on remand from the well-known *United States v. Salerno*, 505 U.S. 317 (1992)), in which the hearsay rule, as interpreted, prevented defendant from introducing favorable grand jury testimony of witnesses who were privileged not to testify because the government did not grant the witnesses use immunity. The net effect was that the trier of fact received neither the witnesses' live testimony nor their grand jury testimony, though both were readily available. Interestingly, even if the defendant had prevailed in arguing for a reading of FED. R. EVID. 804(b)(1) that would allow admission of the grand jury testimony, the trial probably would have proceeded without the more thoroughly examined trial testimony of these readily available witnesses.

56. To the extent that current doctrine invokes presumptions, the jury is generally involved in the administration of the presumption by way of fact finding with regard to the claims of evidence withholding, destruction, and so forth, unless of course the truth of such claims is not reasonably disputable. See *DESTRUCTION OF EVIDENCE*, *supra* note 1, § 2.22. I reject such jury involvement for reasons articulated *infra* in Part V.

finding. In a jury trial, for example, the jury might be told to assume that a witness would testify that the defendant ran the red light. But that proposition is indeterminate as far as the controversy being litigated. What, for example, is the jury to assume in terms of the credibility of the witness, or the confidence with which she would testify concerning defendant's act? Absent information about such matters, what significance is to be attributed to the assumed testimony? Because of such difficulties, it is best to make the preemptive ruling operate at the level of an ultimate fact, an element of the claim or defense. Such preemption leaves nothing, or at least very little, for the jury to do that would be distorted by artificial assumptions.<sup>57</sup>

This device should be the remedy of choice for post-discovery evidential incompleteness amenable to neither the judicial presentation of evidence nor the invocation of a preferential exclusionary rule. It is aptly viewed as a component of the burden of production, possibly through the medium of a presumption, and it does not rest upon an inference as to the exact nature of the probative value of the missing evidence, beyond the fact that it is probably significant in some way. In this sense, it wears its artificial character on its sleeve: It minimizes the temptation of an observer of the litigation to take the result as reflecting what likely happened between the parties.<sup>58</sup> The artificiality is entirely defensible in terms of protecting the tribunal (judge and jury) from being put in the position of making a deci-

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57. It does not, for example, require the court to instruct the jury that it is to take the ultimate proposition in question to be certainly true. Rather, it simply removes that element from the case as a proposition on which a formal *finding* must be made. Thus, if the probability of that proposition's being true matters in deciding other elements of the case, and other such elements are not also judicially foreclosed, the jury might attribute to the foreclosed element a probability less than that required under the applicable burden of persuasion. So the jury's deliberations with regard to the other elements remain unfettered.

58. A partially apt analogy is the statute of limitation. Choosing not to decide the merits of the specific allegations does not necessarily entail leaving the parties in the status quo ante; even if the party who loses as a consequence of a refusal to decide the factual merits of the claim is the party who bore the initial burden of persuasion and production on the issue in question, that does not leave the parties in the status quo ante because *res judicata* would apply to prevent the loser from reasserting his or her barred claim in subsequent litigation, and thus uncertainty about legal claims is reduced or eliminated. As Professor Brilmayer noted, in the context of a decision to foreclose a plaintiff's nakedly statistical claim because of evidential incompleteness,

the prejudice to future actions will result not from any factual finding about the probability of guilt, but from the fact that a plaintiff only gets one bite at the apple. Having had one opportunity to present the case the plaintiff is barred even if he or she later returns with better evidence.

See Brilmayer, *supra* note 39, at 685. On the other hand, one important point of dissimilarity from statutes of limitation is that the burden of production need not fall on the plaintiff under the theory I advance here.

sion on the basis of an unreasonably incomplete package of evidence. And in jury cases, this mode of response shows appropriate respect to the jury in its fact-finding role by not asking it to perform hypothetical inferences skewed by jury instructions creating irrelevant or possibly counterfactual assumptions.

This last reason illustrates why the recommended response need not be characterized as "punitive." Rather, it can and should be understood as *protective*. It serves to protect the tribunal from being put in the position of deciding very serious matters that are the subject of legal claims based on evidence that is unreasonably incomplete.<sup>59</sup> Moreover, the peremptory rulings endorsed here do not involve court mandates to present evidence. Instead, the message they give is that *if* such evidence is not introduced, which remains a legitimate option of the burdened party, then that party may not seek a favorable determination under the applicable burden of persuasion.<sup>60</sup>

It remains, however, to specify *against whom* the peremptory ruling should operate. Given the primary goal of obtaining the missing evidence at minimal cost, the burdened party should be the party with better access to the missing evidence. As we saw earlier, in many but not all cases this will also be the party who would be expected to present the evidence if it were favorable to that party. However, in a case where attempted suppression has been incompletely successful, as when business records have been partially destroyed, so that the suppressor has superior access but dubious motives, the burden might have to rest upon the opponent, with inferior access, for the sake of protecting the integrity of the evidence. Finally, in the not improbable case that neither party has discernibly superior access, the burden should be imposed on the party bearing the burden of persuasion on the issue.<sup>61</sup>

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59. This is not to deny that explicitly punitive measures may be appropriate in the context of reversible deficiencies. Once again, without such measures, instrumentalist litigants might see no reason not to take the chance that their suppression will go undiscovered. A distinct tort claim is appropriate in cases of demonstrable bad faith. Sparse case law concurs. *See, e.g., Vivano v. CBS, Inc.*, 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991) (recognizing fraudulent concealment tort).

60. In analogous fashion, all manner of formal requirements on the enforceability of wills or contracts cannot rightly be described as intended to "punish" parties who fail to comply with them. Rather, these requirements limit the parties' access to the courts to enforce the will or contract. Parties remain free, for example, to enter into and to perform oral contracts within the statute of frauds.

61. Cf. Joseph M. Livermore, *Absent Evidence*, 26 ARIZ. L. REV. 27, 36-37 (1984) (arguing that adverse inferences should be allowed against the party with the "burden of proof"). Although Professor Livermore did not consider the kind of judge-centered response discussed here, it is interesting to note the limited nature of his approval of the use of adverse inferences:

For a variety of reasons, the conclusion is inescapable that as a general rule such



Predictability is, of course, to be valued, *ceteris paribus*. And one might ask how the party initially burdened on the relevant element will know that his opponent (or a co-party) has easier access to certain evidence, so that the former is relieved of the burden to produce it. As a general matter that may be hard to know, and as a consequence the initially burdened party is likely to act as if the burden remains upon him. However, it should be possible to create "safe harbors" for litigants in some contexts. For example, the costs of production for a document ought to be presumed to be less for the party who is in possession of the document, a result that is compatible with the treatment of secondary evidence of documents under the original document rule.<sup>62</sup> By the same token, the costs of producing a witness ought to be presumed to be less for a party closely identified, by employment or family ties, with the witness.<sup>63</sup> Further, provisions could be worked out to allow notice and hearing prior to trial on issues of comparative access.

One additional problem should be addressed. Suppose *both* parties have superior access, each as to a different piece of important missing evidence. How should this be handled? An orderly solution is to treat them seriatim, according to the burden of production that otherwise governs particular elements. At the end of plaintiff's case in chief, if sufficiently important but missing evidence concerning an element of the plaintiff's affirmative case (that is, an element upon which the plaintiff bears the burden of persuasion) is more readily available to the plaintiff, then the preclusive consequences of that burden should be imposed. Then, if other evidence as to such an element is peculiarly available to the defendant, the burden resulting therefrom should operate to preclude at that point a directed verdict against the plaintiff solely on plausibility grounds, deferring resolution of the matter until defendant has had a chance to present the missing evidence.<sup>64</sup> If no verdict is directed against the plaintiff, ei-

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inferences are unsound. They may, however, be justified as a mechanism to insure, in a limited number of instances, that certain evidence will be presented. Requiring trial judges to address the inference in these terms is more likely to improve factfinding not only because important evidence will more probably be available but also because factually misleading inferences will be eliminated.

*Id.* at 40. But if adverse inferences only make sense as a mechanism to insure production, then a more direct mechanism, such as the burden of production, should be used.

62. See FED. R. EVID. 1004(3) (excusing the use of the original when an opponent with notice is in possession of the original).

63. It is understandable that an opponent might be reluctant to call such a witness, a fact which helps to explain, though not justify, the traditional use of adverse inferences against the party related to such a witness. See MCCORMICK, *supra* note 14, § 264, at 463-64 (noting that some uses of such inferences fall into this category rather than the category of inferences from exclusive control of the missing evidence).

64. To this extent, I take issue with those cases concluding that withholding of evi-

ther on incompleteness grounds or plausibility grounds, then, at the close of defendant's case in chief, the court should resolve any remaining issue of incompleteness associated with defendant's superior access to evidence related to the plaintiff's affirmative case; if such evidence has been presented, the court proceeds to determine any remaining issue preclusion on plausibility grounds against either party on the elements of the plaintiff's case. This process is then reversed for consideration of any affirmative defenses in the case. Finally, if the case remains open, it would be submitted to the trier of fact with confidence that adjudication will take place on the basis of reasonably complete evidence.<sup>65</sup>

These procedural points serve to emphasize an important difference between my framework and the conventional understanding of the burden of production. It is common fare to acknowledge that one relevant factor in determining the allocation of the burden of production is the relative access of the parties to evidence.<sup>66</sup> But this operates, as it were, wholesale: One cannot *split* the burden of production between one party who has generally better access to evidence, or who for other reasons should be assigned the burden of producing evidence with respect to a particular element, and another person who has better access only to particular evidence. By recognizing two distinct components of the burden of production, my analysis allows one to *tailor* the burden in a way that is not easily accommodated under the conventional analysis.<sup>67</sup>

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dence by the defendant cannot substitute for plaintiff's proof of a prima facie case. See McCormick, *supra* note 14, § 264, at 188. This view is also commonly expressed in the context of destruction of evidence (irreversible deficiencies), though there are more signs of change on the point. See *id.*, § 265, at 192-94.

65. Where the costs of producing the evidence ultimately come to rest is a separate matter. In the partial destruction case, for example, the costs of reconstructing the evidence should be borne by the suppressor. Similarly, in the presumably rare case in which intentional suppression by one party has caused another to be the one with superior access, the burdened party should be indemnified by the suppressor for reasonable costs incurred in acquiring and presenting the evidence. This case will be rare because suppression typically indicates that the missing evidence would be favorable to an adverse party. If so, an adverse party with reasonable access would have strong incentive to obtain and present the evidence, so that no issue of the burden of production or indemnification would arise. Nevertheless, such a case might occur if, for example, a pretrial hearing brings the suppression to light, so that the opponent has an opportunity to request indemnification costs associated with evidence she would present anyway. Another example would arise when the suppressor and the party in the next best position to obtain the evidence are two parties on the same side of the litigation.

66. See, e.g., Friedman, *supra* note 35, at 1965-67.

67. Under the conventional analysis, a rebuttable presumption might operate to shift the burden of producing evidence as to a particular fact  $\phi$  to a party with particular access to the evidence thereof,  $\epsilon$ . See *id.* at 1967-68. But such a presumption does not achieve the result I have prescribed, even if it were administered entirely by the judge, because it

*Irreversible deficiencies by fault.* The analysis is much the same in the context of irreversible deficiencies, although our priorities must be somewhat different. Top priority should go to eliminating gains and losses from faulty destruction of evidence and otherwise creating appropriate disincentives for the suppression of evidence. Still, a secondary goal is to obtain the missing evidence for use in court. This latter goal might seem inconsistent with the assumption of an irreversible deficiency, but it remains a concern in the case by virtue of the uncertainty that generally attends any determination that the deficiency is irreversible. In other words, a judge who makes a determination that the deficiency is irreversible on the basis of information supplied by the parties must acknowledge the possibility that the evidence might still be reasonably accessible, so the judicial response to such a determination should not create disincentives to the production of the missing evidence.

As in the case of reversible deficiencies, exclusionary rules have an important role in responding to suppression of evidence. Examples are not difficult to find: secondary evidence of the contents of a document is excluded if the proponent has destroyed the original in bad faith; and conversely, secondary evidence of the contents of an original document is admitted if the opponent has destroyed the original.<sup>68</sup> Similarly, a proponent of hearsay is denied the use of exceptions conditioned upon unavailability of the declarant if the proponent has procured the unavailability;<sup>69</sup> and conversely, hearsay is admissible against a party who has procured the unavailability of the declarant.<sup>70</sup> But as these examples suggest, the scope of exclusionary rules in dealing with suppression of evidence is limited.

Once again, the burden of production may be used to supplement the exclusionary rules. The principal difference when addressing irreversible deficiencies is that one ought not, indeed one often cannot, allocate the burden of production with regard to the missing evidence based on superiority of access. Even if the evidence remains accessible, but not at reasonable cost for either party (e.g.,  $C_{\pi}(\epsilon) > C_{\Delta}(\epsilon) > C^*(\epsilon)$ ), then allocating the burden so as to minimize cost is self-defeating.<sup>71</sup> Accordingly, one is left to allocate the burden

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imposes only a burden to produce evidence relating to  $\phi$ , not a burden to produce specifically evidence  $\epsilon$ . In the language of presumptions, if it must be used, my proposal involves an entirely *judicially* administered, *conclusive* presumption about the affected ultimate fact against the party with better access to important but unrepresented evidence.

68. See, e.g., FED. R. EVID. 1004(1).

69. See, e.g., FED. R. EVID. 804(a).

70. See, e.g., FED. R. EVID. 804(b)(6).

71. Of course, the court could be wrong in its cost estimates. And it is possible that a judge would find the missing evidence to be irreversibly lost, with a probability greater than .5 but less than 1, and that the judge might conclude that, while neither party proba-

in order to deprive the wrongdoer of the potential benefits of the wrongful conduct. In the unusual event that both sides are culpable in the loss of the evidence, a comparative fault criterion is the best that can be done. The conditional quality of the preemptive ruling, by allowing the burdened party to produce the evidence in court, hedges the court's bets concerning the relative cost and value of the evidence.<sup>72</sup> In cases where neither party can rightly be said to be at greater fault, once again the burden of production should fall upon the party with the burden of persuasion on the affected issue.<sup>73</sup>

In the extant case law there certainly are judicial responses nearly as strong as that suggested here, at least with regard to intentional destruction of evidence, or more precisely, intentional destruction of what is known to be evidence in order to prevent its use against the destroyer.<sup>74</sup> But one might well argue that it is inappropriate to impose such a draconian remedy when the evidential damage is the consequence of mere negligence.<sup>75</sup> Why, in particular,

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bly has reasonable access, one party more probably has such access than the other.

72. When the burdened party is unable to produce the missing evidence, there is the potential for fabricated claims by an opponent. For example, suppose the plaintiff enters into an (integrated) written contract to sell widgets to the defendant. Prior to litigation, the defendant destroys the only original writing with the intention of renegeing on the deal. The original, as evidenced by a duplicate, specifies a price of \$100 per widget, the market price at the time of contracting. The plaintiff, confident that he can prove faulty destruction by the defendant, and knowing of the use of burdens of production against destroyers, alleges and is prepared to testify that the contract provided for a price of \$1,000 per widget. To be sure, problems of this type can arise just as well under current practices, since secondary evidence of the contents of the original would be inadmissible at trial on behalf of the defendant under FED. R. EVID. 1002, 1003(1) and 1004(1). They will need to be controlled under rules such as those requiring good faith in pleadings, *see, e.g.*, FED. R. CIV. P. 11, or by application of the traditional presumption that the remedy extend only to a claim that is most *plausibly* favorable to the non-suppressing party, *see, e.g.*, *Armory v. Delamirie*, 1 Starng 505 (K.B. 1722) (holding that damages for conversion of jewel not produced in court by defendant should be estimated according to its highest plausible value).

73. A possible exception would be when the court is also quite sure that the loss is irreversible. In such an unusual case, the court should treat the loss of the evidence in the same manner as faultless losses, that is, by ignoring it; by hypothesis, the evidence will not be forthcoming by imposing a burden of production, and neither party is more responsible for the situation.

74. The main practical difference from my suggestions is that the conventional doctrines give responsibility to the jury to determine whether the intentional destruction has occurred. *See* DESTRUCTION OF EVIDENCE, *supra* note 1, § 2.18, at 51, and 1997 supp. at 47 (and cases cited therein). *See also infra* Part V.

75. Again, case law is quite diverse, but the present proposal, aside from largely removing the jury from its role in handling incompleteness, entails a stronger response than is typically available for negligent destruction. For example, extant law commonly invokes a presumption shifting the burden of production to the party most responsible for the loss of evidence, but generally the resulting production burden may be satisfied or circumvented by presenting *other* evidence relating to the same mediate or ultimate issue.

should negligence be treated the same as intentional withholding or destruction? Would it not be better, at least in civil cases, to use a more modest response to negligence, such as the monetized damages remedy endorsed earlier with regard to non-party negligence?<sup>76</sup>

The answer to these questions is straightforward. Intentional suppression of evidence is treated differentially under my proposal for the simple reason that my scheme does not preclude punitive responses, including punitive damages and criminal punishment.<sup>77</sup> And, in the context of negligence, where the criminal law rarely treads, and where punitive damages will properly not be allowed, it is better to invoke procedural consequences in the main litigation, thereby saving the considerable costs, public and private, of separate or more complicated litigation and avoiding the serious difficulty of estimating actual damages.<sup>78</sup> Moreover, mere monetary compensation to the adversely affected party does not account for the offender's breach of duty to the tribunal itself. At the risk of oversimplification, the moral intuition involved here is that one's negligent interference with legitimate fact finding should result in one's losing the case, whereas intentional interference should result in that and more.

*Special considerations for criminal cases.* The foregoing arguments apply not only to civil parties but also when the adversely affected party is the prosecution in a criminal case. My proposal expands the circumstances in which a preemptive remedy is available to the defense, but recourse to such a remedy in appropriate cases is less

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*See supra* note 67. To be sure, sometimes courts also shift the burden of persuasion on the issue. *See, e.g.,* *Welsh v. United States*, 844 F.2d 1239 (6th Cir. 1988) (holding that negligent destruction of evidence shifts burdens of production and persuasion to defendant). And a recent article endorses shifting the persuasion burden. *See* Porat & Stein, *supra* note 30, at 1941-60. Putting aside the relatively modest impact that persuasion burden shifting is likely to have in many cases, this approach generates an unjustifiable asymmetry: Shifting the persuasion burden is not viable when the party who is responsible for the loss of the evidence happens to be the person bearing the burden anyway. Consequently, this remedy is of little value when evidence is destroyed by plaintiffs, who are, therefore, arbitrarily preferred by this approach.

76. This is the principal response preferred by Porat & Stein. *See supra* notes 30-31. and accompanying text.

77. In civil cases, a punitive civil claim or counter-claim could be allowed in the principal litigation, and such a claim might proceed on its own even if the judge terminates the principal claim summarily against the destroyer. The punitive claim might be adjudicated before the judge or submitted to a jury; efficient administration would suggest it should be the judge at least whenever the jury is not otherwise involved in determining the effect of the evidential incompleteness.

78. On this point, I agree with Professor Friedman. *See* Friedman, *supra* note 35, at 1979-80 (arguing that remedies "intrinsic" to the litigation of the primary claim are adequate and more efficient remedies in most cases than a distinct cause of action in tort).

of a change in the criminal arena.<sup>79</sup> To be sure, one might argue that the judiciary has less authority to second guess the investigative decisions made by the executive branch of government than those made by private civil parties. Separation of powers concerns can be cited. On the other hand, the importance of evidential completeness is at its height in the context of criminal trials, and the modest supervision entailed by the need to justify some prosecutorial choices is a small price to pay, one not infrequently paid under present law.<sup>80</sup>

Moreover, one must keep in mind the comparative nature of the institutional choice that is to be made here. That is, we are choosing among three main alternatives: First, a system in which the defendant is not allowed to invoke an argument about evidential incompleteness, either to the judge or the jury; second, a system like the one we have now, in which the defendant is allowed to invoke such an argument before the trier of fact, thus requiring the prosecution to explain or excuse its actions before a jury or risk acquittal; and third, a system like the one I propose, in which such arguments must be made to the trial court or risk dismissal. Unless one is prepared to opt for the first alternative, and few would, considerations of institutional competence favor the third, while the separation of powers issue is largely beside the point.<sup>81</sup>

On the other hand, the principle of holding the government to

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79. Under present law, the usual, if inadequate, remedy for even intentional suppression by the prosecution, when discovered after trial, is retrial with the evidence available for use by the defense, and merely negligent destruction of evidence rarely produces adverse consequences for the prosecution. *See, e.g., State v. Langlet*, 283 N.W.2d 330 (Iowa 1979). But if the prosecution refuses to make potentially exculpatory evidence available to the defense for use at trial, or if the evidence is destroyed in bad faith so that it cannot be made available to the defense, there can be little doubt that dismissal is an appropriate remedy, perhaps the only acceptable one. *See, e.g., United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993) (holding that appropriate remedy in bad faith destruction case is dismissal of the indictment and specifically rejecting, in the context of the case, a government proposal to submit the matter to the jury).

80. *See cases cited supra* note 25. *See also, e.g., United States v. Bahadar*, 954 F.2d 821 (2d Cir. 1992) (discussing circumstances under which a prosecutorial decision not to grant use immunity to potential defense witnesses may be countered by a court deciding that if the prosecution does not grant such immunity the indictment must be dismissed).

81. Whether one chooses the second or the third alternative, the practical limit of the supervisory authority of the judge and jury is to preclude a judgment to which the prosecution would otherwise be entitled. As previously emphasized in the text, neither the jury, nor under my proposal the judge, assumes the authority to *order* the prosecution to undertake particular investigations or to present particular evidence. Under my approach, the judge acts only to limit the access of the executive branch to the courts, a principle long recognized as within the constitutional authority of the courts. Moreover, a judge can be expected to give more consistent effect to legal norms limiting the affirmative duty of the government to avoid irreversible losses of evidence. With regard to such affirmative duties, *see supra* note 21.

proof of its case, combined with the superior resources generally available to the prosecution, counsel against shifting any kind of proof burden to the accused with regard to the elements of the offense when the sole reason to do so is efficiency. In other words, when the missing evidence is reasonably available to both prosecution and defense, the burden of producing that evidence should remain on the prosecution even if the court determines that  $C_{\pi}(\epsilon) > C_{\Delta}(\epsilon)$ . Moreover, even if the burden is rightly shifted to the accused because the evidence is reasonably available to the defense but not to the prosecution, i.e.  $C_{\pi}(\epsilon) > C^*(\epsilon)$  but  $C_{\Delta}(\epsilon) < C^*(\epsilon)$ , or because the defendant was at greater fault in the irreversible loss of evidence, the special concern that the law properly accords the accused rules out what I have called the remedy of choice. Issue preclusion would surely implicate, if not violate, the constitutional guarantee of a jury trial, for it would present too easily the possibility of directed verdicts of guilt.<sup>82</sup> Even if the defendant consents to a bench trial, the defendant has a constitutional right not to be convicted unless the evidence establishes guilt beyond a reasonable doubt. Yet issue preclusion against the defendant would be unnecessary and thus pointless unless the evidence, after taking any intentional suppression into account, left  $\Pr(H)$  less than or equal to  $P^*$ .<sup>83</sup> Consequently, a retreat to other responses seems unavoidable. The obvious choice is to involve the jury by way of missing evidence instructions. This option is explored in the following section.

## V. The Continuing Role of Jury-Centered Responses

Despite the serious deficiencies in relying on adverse inferences and arguments before the trier of fact, the judicially administered issue-preclusive remedies that I advocate here will seem too extreme to some. Moreover, I have already acknowledged a major qualifica-

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82. See, e.g., *United States v. Bosch*, 505 F.2d 78 (5th Cir. 1974) (holding that trial judge may not effectively direct a verdict against the accused even when defense counsel admits the elements of the offense). A not very convincing argument can be made that the defendant "waives"—more precisely, forfeits—his constitutional right to a jury trial by destroying evidence, at least when done intentionally. Cf. *United States v. Thevis*, 665 F.2d 616, 630-31 (5th Cir. 1982) (holding that defendant waived confrontation rights by murdering witness before trial, thus rendering cross-examination impossible). But there is a big difference between holding that the defendant's misconduct with regard to evidence permits introduction, before the jury, of evidence that would otherwise be inadmissible, and holding that such misconduct forfeits trial by jury itself.

83. Conviction might still be constitutional in such a case if the constitutionally required level of proof, beyond reasonable doubt, were construed to allow adjustments of  $P^*$  to reflect the comparative access to evidence or comparative fault in its loss. As will be suggested in the following section, this may be acceptable for modest adjustments of  $P^*$ .

tion on the use of such remedies. If, because of special concerns, we are to involve the trier of fact in regard to evidential damage attributable to criminal defendants, it is natural to ask whether there are other special circumstances in which we can at least "get by" in this manner.

There are three distinct ways this might occur. First, taking issue preclusion as the appropriate remedy, the jury could be involved by deciding the facts that determine the issue preclusion. Second, rejecting issue preclusion, the jury could continue to perform the traditional rule of discounting the evidence on the underlying claim. Third, the jury could be involved by allowing it to have a role in fixing the standard under the burden of persuasion. In the following paragraphs, I reject the first alternative outright and give a very qualified and limited endorsement of the second and third alternatives.

*Conclusive presumptions and jury involvement.* In principle, one could instruct the jury to address the issue of incompleteness separately. Thus, the jury would be instructed to make a determination of unreasonable incompleteness as such and, if necessary, to render a verdict predicated upon such a determination without getting to the question of whether the burden of persuasion has been satisfied on the underlying claim. This amounts to using a conclusive presumption with the jury deciding whether the predicate conditions for the presumption have been met. While it shares many features of conventional responses, there are several reasons to reject such an approach.

First, it rests upon the same analytical confusion that attends so much of presumption law, the idea that the jury is to decide the facts that determine the allocation of the burden of production.<sup>84</sup> Absent a powerful argument for jury involvement, the judiciary should retain its proper role of allocating the burden, within any applicable legislative constraints. Second, the suggested approach severely complicates the role of the jury and the jury instructions that explain that role. We should be doing everything possible to move in exactly the opposite direction, allowing juries to focus on the merits of well-presented claims. Third, the nature, effectiveness, and costs of discovery mechanisms, evidentiary privileges, and the other factors that affect decisions of counsel with regard to evidence within the context of litigation are often matters well beyond the understanding of lay

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84. See Ronald J. Allen, *Presumptions in Civil Cases Considered*, 66 IOWA L. REV. 843, 849-55, 860-62 (1981) (arguing that the traditional roles of the legislature and judiciary in assigning the burdens of persuasion and production are obscured by the label "presumption," with the result that the jury is mistakenly thought to have a role in deciding facts antecedent to the burden allocation decision).



jurors. Fourth, the involvement of counsel signals a different set of concerns having to do with the integrity of the bar, concerns that it is appropriate for the judiciary to monitor more directly than by submitting the issue to the trier of fact.

*Litigative and non-litigative incompleteness: determining the legitimate scope of jury discounting.* But what about jury involvement that takes the form of drawing appropriate factual inferences necessary to perform the jury's traditional and proper role of deciding whether  $\text{Pr}(H) > P^*$ ? In Part III, we saw that there are reasons to be skeptical. In the following paragraphs, I explore the question of whether these objections can be overcome in some practically specifiable categories of cases.

Take an example that is far removed from the rape hypothetical that motivated the foregoing discussion. Suppose testimony is given that a person involved in an automobile accident fled the scene immediately after the crash. This standard example of what is often called an "admission by conduct" evidences a consciousness of liability, but it does so only to the extent that the evidenced flight is an attempt to destroy evidence that would have existed had the motorist waited around for the police to arrive. Under current practice, in a civil case against the fleeing motorist, if evidence were offered to show that he fled the scene, that evidence would be admissible on the question of whether the fleeing motorist was negligent in causing the crash. Generally speaking, such evidence, and the excuses likely to be offered in explanation of the flight, would be readily comprehensible to a lay jury hearing the case. Symmetric discounting is not a problem, and incentive issues are muted by the motorist's probable spontaneity of action. Moreover, such evidence could be admissible for other reasons, such as to prove the identity of the motorist who caused the accident rather than to establish negligence. It would appear that the evidence of flight is simply too close temporally and causally to the litigated events to allow the judge to preempt jury consideration. For these reasons, a judicial determination of whether the defendant intentionally suppressed evidence by his flight might seem to be inappropriate in some cases.<sup>85</sup>

If you are inclined to accept this conclusion then the practical problem is to sort such cases from those in which a judge-centered response is optimal. To give the difference a name, one that speaks to the paradigms under discussion, I shall refer to a distinction between

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85. The same would be true in an analogous criminal prosecution for reckless driving. I have used an example from the civil litigation context because, as indicated in the previous section, suppression of evidence by the accused in a criminal context calls for a jury-centered response even if the special circumstances present in the flight hypothetical are not present.

*litigative* incompleteness and *non-litigative* incompleteness, the former being the kind that might still be properly assigned to the judge and the latter being the kind properly assigned to the trier of fact, which I will simply call the jury. One approach to this problem would be to allow the judge to decide ad hoc whether each particular problem of unreasonable incompleteness is best suited to a judge-centered response or a jury-centered response. De facto, that is the system we have now, and for obvious reasons it usually results in the problem being thrown to the jury. I want to explore, therefore, whether a more rule-governed system of allocation—one that would protect the proper role of the judiciary—is possible.<sup>86</sup>

The flight hypothetical isolates two factors, each one of which might form the basis of the distinction we are trying to articulate. One possibility is that it is the involvement of legal counsel in the making of decisions with regard to evidence that signals the most important difference. That is the point at which the trial judge assumes a distinct comparative advantage in evaluating the significance of missing evidence. Further, involvement of counsel is a convenient point to mark off the *litigated events* from the *events of litigation*. Thus, one approach is to opt for a jury-centered solution when the advice of counsel is not implicated.

The second possibility would be to let the jury handle the incompleteness issue whenever significant aspects of the information showing the possibility of unreasonable incompleteness—the evidential misconduct evidence—would be admissible anyway, despite the issue foreclosure that might attend a judicial response. For example, under this approach, if evidence of the motorist's flight is admissible to counter the motorist's claim of his physical injury, despite judicial foreclosure of the question of the motorist's negligence in driving while intoxicated—important evidence of which was lost by the inability to conduct a timely sobriety test, then the issue of negligence would be submitted to the jury and the flight evidence would be admissible as well for the purpose of showing consciousness of the adverse nature of the intoxication evidence destroyed by the flight.<sup>87</sup>

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86. I realize that some will resist the idea of rules for the control of evidence matters, and I have much sympathy for that view. One can also think of my proposed norms, here and elsewhere in the paper, as guidelines for the exercise of judicial discretion. I suspect, however, that trial judges may need more encouragement than that approach might entail.

87. The usual argument for admitting evidence of flight is that it shows a consciousness of wrongdoing, an inference about which commentators are often and rightly skeptical. See, e.g., MCCORMICK, *supra* note 14, § 263, at 462-63. Under the approach discussed in the text, courts would have to be somewhat more discerning in identifying the basis for admitting such evidence. To the extent that evidence of flight is offered not as evidence of the defendant's physical condition after the collision, but rather as evidence

The virtue of this approach is that it accepts as inevitable the attention that will be given by the jury to evidential deficiency and thus avoids inconsistency between judge and jury decisions about incompleteness as well as the confusion and potential ineffectiveness of limiting instructions. The corresponding difficulty with this option is that sometimes the jury would be considering cases for which it does not have the best available institutional competence or remedial resources.<sup>88</sup>

Obviously, there are two additional options that can be formed by combining the first two. One can eschew judge-centered responses if *either* factor is present, or one can do so only if *both* factors are present. The former combination amplifies the vices of the second single-factor approach, while the latter minimizes them. For that reason, if we are to go down this path at all, the optimal approach employs the jury to deal with incompleteness only if *both* of the first two conditions are satisfied, that is, only when (the trial judge finds

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of consciousness of the adverse nature of the evidence against the accused in the absence of flight, the real issue is destruction of evidence and the consequences that are to follow therefrom. If so, then the condition stated in the text might not be satisfied. In such a case, satisfaction of the condition would depend on whether there exists a legitimate inference through consciousness of wrongdoing that is meaningfully distinguishable from an inference through consciousness of the adverse nature of the potential evidence. I think not. On the other hand, most flight cases are criminal cases, *see id.* at 463, as to which these distinctions will matter little. *See supra* note 85.

Similar problems arise in connection with *unsuccessful* attempts to suppress evidence. The present analysis does not speak directly to such cases, since by hypothesis the trier of fact is not deprived of the evidence in question. Such evidence is often admitted as showing consciousness of wrongdoing, despite the fact that such evidence cannot be introduced on the theory that it shows something about the content of the evidence sought to be suppressed. Careful analysis reveals that such evidence is offered to show that the suppressor is a bad person, and for the possible propensity inference to be drawn therefrom, and as such should not be admitted under conventional analysis. *See MCCORMICK, supra* note 14, § 265, at 465 (expressing doubt about the wisdom of such admissions, and commenting, "The litigant who would not like to have a stronger case must indeed be a rarity. It may well be that the real underpinning of the rule of admissibility is a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof."). Of course, the analysis is different if the suppressor testifies; in that case, the evidence of the suppressing act might be admissible impeachment evidence reflecting a general propensity to be dishonest. *See, e.g., Fed. R. Evid. 608(b).*

88. It is, of course, true that such problems of jury background are often handled in trials by the use of expert testimony. One can imagine attorneys being employed as expert witnesses to explain the economics of litigation for the jury. But three factors counsel against such an approach in this context. First, such testimony would amplify the distraction already inherent in having the jury evaluate litigative behavior rather than the underlying claims. Second, it is inefficient to employ experts of this particular type when an expert in litigation is readily available in the person of the trial judge. And third, whether or not expert witnesses are involved, such inquiries may involve strategic considerations that implicate exclusionary rules the point of which would be lost or undermined if explained to the jury.

that) a party's actions causing unreasonable incompleteness were independent of legal counsel *and* evidence of such actions would be admissible independent of completeness concerns. This option has the advantage of limiting most strongly the cases in which the jury attends to completeness issues.

Because of the first condition, a preliminary issue that the trial court would need to resolve in order to choose whether or not to submit the consideration of evidential incompleteness to the jury is whether the failure to present the evidence in question is attributable to decisions or advice of counsel. While obtaining the information necessary to make this determination might not be technically resistible on grounds of attorney-client privilege, such investigations into confidential communications should not be undertaken lightly. Fortunately, there are some easily administrable rules of thumb that would suffice to help the trial judge in the sorting process.

Most importantly, if by the time of trial the incompleteness of the evidence is found to be reversible, then the incompleteness very likely should be considered litigative. That is, once the facts are discerned that show the evidence to be reasonably available to a party, the failure of that party to present the evidence is likely the result of legal advice. It is, of course, possible that the client might act to conceal evidence without the knowledge of the attorney, but if so the onus of arguing such is legitimately placed upon the attorney. It would be reasonable, therefore, for the trial judge to employ a rebuttable or even conclusive presumption that a reversible deficiency, responsibility for which is still attributable to a party after consulting legal counsel, is the kind of incompleteness that should be evaluated and acted upon by the trial judge without the intervention of a jury. For practical purposes, what this means is that consideration of the problem of evidential incompleteness would be submitted to the jury only when a party's faulty conduct before consulting an attorney has caused irreversible incompleteness of the evidence.<sup>89</sup>

Not surprisingly, additional rules of thumb would be necessary and presumably would evolve in implementing this scheme. For example, the question would surely arise whether a party with perma-

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89. One might want to allow the presumption to be rebutted when the attorney is willing to break ranks with the client and inform the court that the client is, or may be, withholding available evidence against the advice of counsel, or that the client has, or may have, destroyed previously available evidence without the attorney's encouragement or approval. In order to discourage attorneys from routinely and dishonestly disavowing any knowledge of or participation in a decision not to present evidence or to destroy it, the attorney might be required, for example, to either (1) explain to the court why the attorney believes the client has reasonable access to the missing evidence or has rendered such evidence unavailable, or (2) state under oath subject to penalty of perjury that he has no reason to believe that.

nently retained or in-house counsel should be viewed as having consulted with an attorney from the moment of the actions that form the basis of the underlying claim. I think that question should be answered affirmatively, employing either a rebuttable or conclusive presumption to that effect. Similarly, conduct of police and investigative officials prior to the explicit involvement of prosecuting attorneys arguably poses the same kinds of inferential difficulties discussed above and is likely to be significantly affected by the ongoing relationship between the police and prosecutors. Thus, evidential deficiency should be assigned to the judge for an appropriate response if it is attributable to the conduct of police officers or other investigative officials.<sup>90</sup>

Now, one can certainly question whether the benefits to be derived from leaving to the jury issues of non-litigative incompleteness—those meeting both conditions discussed above—are worth the considerable complexities that are introduced in order to do so. I am quite skeptical about this, but I have tried to state the case as well as I can. Even in the fleeing motorist case, there is little to fear in the trial court's instructing the jury to consider evidence of flight only as to those issues not judicially foreclosed. Nevertheless, assuming that we are going to allow for such exceptional cases to be assigned to the jury, we would still need to address the question of how the jury should go about its task.

*The use and misuse of missing evidence instructions.* In the context of non-litigative incompleteness, in what way should the trial judge frame the issue for the jury? The answer depends on whether the possibly unreasonable incompleteness is the result of bad faith or of negligence. Consider the matter in regard to bad faith suppression.

In the first place, when a jury instruction explicitly or implicitly calls for the jury to make a *finding* concerning the (un)availability of the evidence, it is inviting a particular kind of inferential error. It is inviting the jury to *treat as true* a proposition that is only probable or, conversely, to *treat as false* a proposition that is only improbable. Of

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90. A determination by the judge favorable to the defendant will end the prosecution, at least as to any count significantly affected by the missing evidence. On the other hand, reasonable minds could disagree about the proper approach given a determination favorable to the government. The approach that I favor is to preclude the defendant from raising the issue before the jury. Of course, the prosecution would still have to show the defendant's guilt beyond reasonable doubt. (Such preclusion is probably no more suspect constitutionally than precluding a defendant's argument on (or denying a jury instruction with respect to) an affirmative defense when the judge determines that there is insufficient evidence to support it.) Alternatively, defendant might be given a second bite of the apple by being able to pursue the claim of evidential incompleteness before the jury, perhaps subject to judicial comment as to the results of the peremptory motion.

course, the law often engages in such "fictions" in the determination of cases by making remedial consequences turn on findings of that sort about the ultimate propositions or elements of a cause of action, and it does so for good reason.<sup>91</sup> Indeed, my proposal entails such findings by the trial judge with regard to litigative incompleteness.<sup>92</sup> But unless encouraged or compelled to do so by poorly crafted instructions, reasonable jurors would not extend this kind of "as if" analysis to the inference process antecedent to the ultimate propositions in the case. Thus, a reasonable juror will take into account the mere possibility that the evidence is reasonably available, even if it is more probable than not that it is unavailable.<sup>93</sup> Conversely, a reasonable juror will not take availability as certain just because it is more probable than not, yet requiring a finding encourages such thinking. Moreover, this kind of artificiality is amplified if the jury instruction creates a presumption that the jury is told to administer by deciding if the party burdened thereby has superior access to evidence or has presented an adequate explanation for its absence.<sup>94</sup>

These inferential difficulties can be avoided by careful drafting of the instruction, avoiding the language of presumptions: If an instruction is to be used at all, the jury should be told simply that, in deciding whether the burden of persuasion has been satisfied, it may take into account circumstances suggesting that evidence available only to one side has not been presented because of that party's awareness that the evidence would be unfavorable, or—much more likely case—that for similar reasons evidence has been intentionally rendered no longer reasonably available.<sup>95</sup>

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91. See Kaye, *supra* note 5.

92. In addition, the trial judge's determination of whether the possibly unreasonable incompleteness is litigative or non-litigative affects the admissibility of evidence and to that extent is governed by Federal Rule of Evidence 104(a).

93. This is a point that is ignored all too often, as is made plain by the history of the doctrine of conditional relevance. See generally Nance, *supra* note 54. I do not mean to imply that jurors do not use, at least implicitly, conditional probabilities, such as the probability that the defendant committed the crime assuming that testimony placing him at the scene is accurate. However, in such uses, to the extent the jurors attend explicitly to a conditional probability, they know that it is hypothetical and eventually adjust for that fact.

94. Cf. RONALD J. ALLEN, ET AL., EVIDENCE 856, 860 (2d ed. 1997) (arguing that in regard to presumptions generally, it is better to have the judge decide the predicate facts that activate the presumption).

95. One might wonder why such a weak instruction would be needed. After all, does it not just tell the jury to infer what they would rationally infer anyway? The answer to that is that it may be necessary to avoid a negative inference by the jury to the effect the jury is not *allowed* to consider the issue of missing evidence. Put conversely, the jury might well think that they are to consider only evidence presented to them. Indeed some jury instructions say as much:

The law does not require any party to call as witnesses all persons who may have

It might appear that such an instruction would be inappropriate in negligent destruction of evidence cases. After all, one point of our earlier discussion is that such negligence is not properly reflected in the jury's determination of  $\text{Pr}(H)$ . But there is another way to look at the matter. It is addressed in the following section.

*Adjustments of the burden of persuasion.* In a recent essay, Richard Friedman has suggested that the standard of proof, our  $P^*$ , might be adjusted to reflect a party's conduct in causing damage to the evidence.<sup>96</sup> The idea would be that if a party has wrongfully suppressed evidence,  $P^*$  would be raised or lowered to reflect that fact. Returning to the decision theoretic-model, it is clear that the reason we might do this is because of a lowered concern about the disutility of a factually erroneous decision against a person at fault in suppressing evidence. Friedman describes this proposal as appropriate when evidence is damaged in an "egregious" manner. He is not clear about who would do the adjustment of  $P^*$  in a jury trial, judge or jury. But in keeping with the conventional understanding, presumably it would be the judge.

Professor Friedman recognizes one problem with this idea: the possibility of a form of double counting should the trier of fact use the fact of suppression in determining  $\text{Pr}(H)$  when the trier of law (or perhaps the trier of fact) is also using the suppression in fixing  $P^*$ . Indeed, judicial adjustment of  $P^*$  would have to be communicated to the jury in a comprehensible way, for they would surely wonder at being told, for example, that the plaintiff wins in this case upon establishing that  $\text{Pr}(H) > .4$ . Explaining this in terms of an adjustment that the judge has made on account of egregious conduct by a party in suppressing evidence is sure to invite double counting, and so the judge will have to take the likelihood of such double counting into account in determining the appropriate adjustment. This is liable to become an extremely difficult matter. Of course, these problems become less intractable if the same decision-maker is responsible for both the adjustment of  $P^*$  and the determination of  $\text{Pr}(H)$ , since the decision-maker's own rationality will help to guard against double counting. Thus, Friedman's approach makes more sense in bench trials or in trials for which the jury has at least some role in the determination of  $P^*$ .

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been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

3 DEVITT ET AL., *supra* note 42, § 73.11.

96. See Friedman, *supra* note 35, at 1971-72. See also Friedman, *supra* note 7, at 279.

But that introduces another problem. Such an adjustment of  $P^*$  by the jury seems to be exactly what we commonly affirm is *not* supposed to happen. In particular, the message that we routinely attribute to rules like Federal Rule of Evidence 404(b) is that bad acts distinct from the subject claim are generally not to be admitted, in part because of the risk that the jury will adjust  $P^*$  accordingly.<sup>97</sup> While this particular problem does not come within the literal prohibition of Rule 404(b), there is still a serious risk of a kind of prejudice that is ordinarily considered unfair.<sup>98</sup> For that reason, adjusting  $P^*$  should play at most a limited role in dealing with evidential incompleteness.

Such a role may be useful, for example, in the context of non-litigative (and therefore very probably irreversible) incompleteness, if it is assigned to the jury for an appropriate response. In particular, a party's negligent destruction of evidence will not ordinarily warrant discounting  $\text{Pr}(H)$ , since mere negligence does not indicate an awareness that the evidence would have been unfavorable to the negligent party. On the other hand, negligence may be the basis of a modest adjustment of  $P^*$ . Given the usually vague formulations of the standard of persuasion, it is not implausible to imagine a trier of fact making such an adjustment within the law's framework.<sup>99</sup> Thus, contrary to Professor Friedman, I conclude that this particular tool is most valuable for dealing with those residual cases of non-litigative incompleteness where the party's conduct is *not* egregious.

*Special considerations for criminal cases.* The remaining issue, left over from Part IV, is how to deal with *litigative* incompleteness when the adversely affected party, under the preemptory ruling approach generally preferred, would be the accused. Here the issue should not be taken from the trier of fact, and conviction should not be imposed by the trier of fact unless  $\text{Pr}(H) > P^*$ . As with non-litigative incompleteness, the appropriate response would be to allow the prosecution to argue before the jury for an adverse inference against the accused and to allow the parties to present to the jury information relevant and otherwise admissible in order to support or oppose this inference.

That does not mean, however, that the comparative expertise of the trial judge should be ignored completely. An appropriate com-

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97. See Lempert, *supra* note 11, at 1132-41.

98. Since the jury is not being asked to infer the litigant's substantive wrongdoing from his or her evidentiary wrongdoing, the propensity inference prohibition of Rule 404(b) is not literally invoked. But this is only because there is a more extreme form of what is conventionally considered prejudice, directly inviting the jury to adjust the standard of persuasion because of the party's distinct wrongdoing. It is largely to avoid the latter adjustments that we prohibit propensity arguments.

99. For example, this might be a ground for jurors' adjusting  $P^*$  in a routine civil case to be less than .5. See *supra* notes 11-12 and accompanying text.



promise, in cases where the incompleteness is properly attributable to advice of defense counsel, would be to allow the trial judge to make a finding about whether the evidence is unreasonably incomplete, using the special criteria applicable to the defense.<sup>100</sup> If the finding is negative, then the prosecution would be foreclosed from such argument and its supporting evidence. Conversely, if the finding is affirmative, the argument would be permitted and the judge would instruct the jury, in non-binding terms, as to the judge's affirmative determination. Thus, the jury would be informed of the trial judge's reasons for believing that either (i) the defense intentionally (or negligently) destroyed potentially relevant evidence, or (ii) the defense has exclusive access to such evidence but has not presented it.<sup>101</sup> The defense would then be free to challenge such reasons before the jury, and the jury would be told that it is not bound by the judge's opinion.<sup>102</sup>

### Conclusion

Current law and practice reflects a decided ambivalence toward the problem of missing evidence. For good reason, we want to tell jurors that they should decide the case on the basis of evidence adduced and not on the basis of guesses as to what has not been produced and why. And we often tell them just that.<sup>103</sup> On the other hand, we feel compelled to back off from this stance in situations where, in the opinion of the judiciary, the evidence may well be unreasonably incomplete. Commonly, this is done by authorizing the jury to do precisely what we generally want them not to do, a practice rife with difficulties.

My main point is that the solution to this ambivalence lies in the recognition that, in an adversarial system, no less than an inquisitorial one, it is the duty of the trial judge to assure that the trier of fact is not placed in the position of having to decide a case under conditions of unreasonably incomplete evidence. It is a duty owed to the parties, the jury (if there is one), and to the public at large. The fact that

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100. These special conditions are articulated at the end of section IV, *supra*.

101. Obviously, under current law such an instruction is ruled out when it would violate a constitutional privilege, such as the privilege against self-incrimination. This exception will cover the most important source of information exclusively available to the defense, namely the testimony of the accused. See *Griffin v. California*, 380 U.S. 609 (1965).

102. This may not be possible in those jurisdictions that prohibit judicial comment on the evidence, but even in such contexts the comment suggested in the text is legitimately differentiable as involving comment on evidence *not* presented rather than comment on the credibility or persuasiveness of presented evidence. Moreover, this is a special situation where the nominally appropriate judicial response to a failure to meet the burden of production is forgone out of necessity, and thus an exceptional attitude toward judicial comment would be defensible.

103. See, for example, the standard jury instruction quoted *supra* note 95.

adversarial adjudication relies principally on the parties' incentives in order to discharge this duty does not relieve the judiciary of ultimate responsibility. Nor does the fact that adversarial incentives are generally effective in achieving a reasonable completeness of the evidence.

The question of how best to discharge that judicial duty is a complicated one. The factors to be considered are numerous and permit wide variations among cases, thus complicating the task of formulating a comprehensive set of guidelines.<sup>104</sup> For that reason, many of my conclusions are negative in character. Most importantly, one ought not to submit to a jury consideration of the possibility that evidence suffers from incompleteness unless it is unavoidable, as in criminal cases, and unless one gives the jury meaningful and efficient assistance in performing its task of evaluating the significance of such incompleteness. Further, if the jury is to be involved, one ought not to use instructions that invite the jury to make a finding about whether evidence has been suppressed, as distinct from instructions that simply authorize the jury to consider evidence of suppression (and thus the probability of suppression) for what it is worth. Similarly, one ought not to use instructions that focus on the relative superiority of access to evidence, as distinct from one that indicates the relevance of exclusive (reasonable) access by one side in the dispute.

My affirmative approach derives from these negative conclusions. I have argued that, in the absence of an adequate response under the rules of admissibility, the optimal approach in most civil cases is for the trial judge, upon an appropriate motion and with reasonable notice to the adversely affected party, to preclude an issue from proof by determining it summarily based on the failure to discharge the burden of production. In the case of reversible deficiencies, that burden should fall on the party with exclusive or superior access to the evidence, or, in default of superior access, upon the party with the burden of persuasion. But if litigative incompleteness is no longer reversible, then the burden should be allocated on the basis of the comparative fault of the parties in creating that situation. The same points apply as against the prosecution in criminal cases.

However, in criminal cases when the accused bears responsibility for the evidential deficiency, and perhaps in civil cases where the issue is of the type I have called *non-litigative* incompleteness, the issue of what to do with evidence tending to show unreasonable incompleteness may be entrusted to the jury, using instructions that avoid

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104. In particular, my arguments are short of comprehensive in that they do not address the issue of what to do when the incompleteness of the evidence becomes known only after judgment is entered. The principle of finality that enters here raises further dilemmas that I have not attempted to resolve.

the pitfalls described above. Under the most plausible articulation of the distinction between litigative and non-litigative incompleteness, the one that gives the least scope to jury involvement, this response will be appropriate only in case the party renders evidence no longer reasonably available by faulty conduct occurring before a lawyer is consulted and under circumstances such that evidence of that conduct would be admissible apart from its relationship to evidential incompleteness and despite any issue preclusion resulting therefrom.

I do not pretend to have uttered the last word on how the distinction between litigative and non-litigative completeness should be drawn, but I hope to have convinced the reader that it should be drawn so as to favor judge-centered responses much more so than is true under present practice. However the distinction is articulated, the decision whether a particular issue involves litigative or non-litigative incompleteness is one to be made by the trial judge, not the jury. Moreover, if the judge determines that any unreasonable incompleteness of the evidence is litigative, and also determines that any such litigative incompleteness is not unreasonable after all, that is the end of the matter, even in criminal cases; there is no submission of the issue to the jury, and the parties are not free to argue missing evidence inferences. Indeed, upon request of a party, an instruction may appropriately be used to preclude the jury's consideration of the fact of omission.

Most of these prescriptions can be achieved under the present state of the law. It is primarily a matter of the will of the courts to do so. It is important that they accept the responsibility to assure that, except in compelling circumstances, trials do not proceed to the usual determination of whether the burden of persuasion has been satisfied when the conduct of the party has rendered the evidence unreasonably incomplete.