Abuse Excuses and the Logic and Politics of Expert Relevance

by
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Introduction

Some scholars and judges have declared war on environmental hardship defenses, often derisively labeling them "abuse excuses." These are defenses in which counsel argues that some oppressive condition in a criminal defendant's social environment must be understood in order for the finder of fact to comprehend the defendant's mental state.1 Social environment can be raised in any context where the defendant's mental state is relevant: insanity, self-defense, diminished capacity, duress, and extreme emotional disturbance. Some environmental hardship defenses have previously been quite successful, some not.2 Examples include battered woman syndrome, black rage, cultural evidence, urban psychosis, and television intoxication.3

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1. See, e.g., PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW 5-8, 129-31, 198-201 (1997) (defining "environmental hardship" defenses while explaining media and judicial hostility toward at least one such defense, "black rage"); JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 90-91 (1997) (describing the "unwarranted panic that determinist approaches to human behavior strike in the heart of traditional criminal scholars," as illustrated by their reaction to Richard Delgado's proposed "coercive persuasion" defense); Abbe Smith, Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer, 21 N.Y.U. REV. L. & SOC. CHANGE 433, 443-44 (1994) (describing judicial attitude toward evidence of rotten social background: "Allowing a Social Scientist to testify in a criminal case is worse than allowing a mental health professional to testify; in the judge's view, at least mental health professionals draw on their own experience with patients.").

2. See, e.g., Smith, supra note 1, at 446-47.

3. See sources cited supra note 1; Patricia J. Falk, Novel Theories of Criminal De-
Some courts have flatly declared expert testimony on environmental hardship irrelevant. One judge, after regretting his decision to admit such testimony, instructed the jury to ignore the testimony as irrelevant. The conviction was affirmed on appeal. One commentator summarized the appellate court's reasoning on the irrelevancy claim as follows: "[T]he court's role is limited and... it cannot be concerned with broad issues of justice."

Today the relevancy of expert testimony about environmental hardship will often be decided under the now familiar "relevancy and reliability" test of Daubert v. Merrell Dow Pharmaceuticals, Inc. for


5. HARRIS, supra note 1, at 130. The case Harris discussed was United States v. Alexander, 471 F.2d 923 (D.C. Cir. 1972), cert. denied, 409 U.S. 1044 (1972), as amended (D.C. Cir. 1973). In Alexander, the defense psychiatrist testified that the defendant was delusional, "preoccupied with the unfair treatment of Negroes in this country and the idea that racial war was inevitable." Id. at 957. He testified at length about the defendant's upbringing as a cause of the delusions. HARRIS, supra note 1, at 127. In his closing argument in support of an insanity defense, defense counsel relied on the defendant's difficult childhood environment or "rotten social background." Id. at 128. After closing arguments, however, the trial judge "became agitated and refused to allow the jury to consider the social and economic environment of the defendant." Id. at 129. See also 471 F.2d at 968 (McGowan, J., dissenting) ("[The trial judge's instructions] remind the jury that the issue before them for decision is not one of the shortcomings of society generally...").

Environmental hardship defenses have also been challenged as based on a divisive notion of group identity, undermining individual responsibility, and embodying "junk science." See, e.g., JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? (1997); ALAN DERSHOWITZ, THE ABUSE EXCUSE (1995). The first two of these challenges are essentially claims that the evidence is irrelevant under Rule 401, or of such low probative value as to be unhelpful to the jury under Rule 702. See WILSON, supra, at 107-08 ("The most valuable approach to expert testimony, however, is for the trial judge to greet with skepticism any claim that social science can tell a jury much about why something happened. Very little such testimony tells the jury much that it does not know from common experience.").

6. 509 U.S. 579 (1993). I am assuming for the purposes of this essay that some
admitting scientific evidence. Unfortunately, the Court had little to say about what "relevance" is other than that it includes "fit." 7 "Fit" simply means that just because a technique's scientific validity is shown for one purpose does not mean that it is valid for other, unrelated purposes.

Whatever the Daubert "relevance" inquiry means, however, we can assume that by choosing this term the Court sought to root its meaning at least partly in familiar evidentiary definitions of relevance. These definitions would include Rule 401's logical relevancy concept—defining "relevant" evidence as making a fact of consequence to determining an action more or less probable than it would be without that evidence—8 and Rule 403 pragmatic relevancy, requiring the exclusion of logically relevant evidence if its probative value is substantially outweighed by countervailing considerations. 9 Both concepts would sweep more broadly in expert evidence cases than is encompassed in the notion of "fit."10 I and some courts and commentators thus assume that Daubert's "relevancy" criterion is more than a requirement of fitness.11

variation of Daubert applies to social sciences, including to the environmental hardship defenses, and not merely to the natural sciences. See, e.g., Edward Imwinkelried, Evidence Law Visits Jurassic Park: The Far-reaching Implications of the Daubert Court's Recognition of the Uncertainty of the Scientific Enterprise, in PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE 118 (1997) ("[T]here is a strong argument that like testimony based on hard science, social and mental health science testimony must pass muster under Daubert's validation test.")

7. 509 U.S. at 591.
8. FED. R. EVID. 401.
9. FED. R. EVID. 403.
11. For example, on remand the United States Court of Appeals for the Ninth Circuit in Daubert said this:

The Supreme Court recognized that the "fit" requirement "goes primarily to relevance," ... but it obviously did not intend the second prong of Rule 702 to be merely a reiteration of the general relevancy requirement of Rule 402. In elucidating the "fit" requirement, the Supreme Court noted that scientific expert testimony carries special dangers to the fact-finding process because it "can be both powerful and quite misleading because of the difficulty in evaluating it." Federal judges must therefore exclude proffered scientific evidence under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an is-
I hope to shed light on what "relevancy" means beyond simply "fit" in the context of environmental hardship cases, though I will briefly return to "fit." I will make two broad, admittedly somewhat speculative points, to illustrate that the "relevancy" inquiry may be every bit as rich as the reliability inquiry.

First, much relevancy scholarship and case law is based on the tradition of "atomistic rationalism." This tradition generally assumes that: (1) there are truths waiting to be discovered by rational inquiry; (2) this judgment of rationality requires "atomistic" analysis of how individual items of evidence interrelate to promote probative value; (3) this analysis requires the identification of linear chains of reasoning; and (4) there is a dichotomy between reason and emotion. Atomistic rationalists operate in an institutional environment in which trial judges view themselves as apolitical arbiters of the cases before them, and distrust broader social inquiries. To the atomistic rationalist, much expert testimony about environmental hardship seems more prejudicial than probative, for it draws the jury into the politicized arena of social conflicts well beyond the criminal case, appealing to emotions ("sympathy") rather than rationality.

An alternative developing tradition is that of holism, which stresses that a mass of trial evidence can be persuasive in a way that analysis of individual items of evidence cannot. Much of what persuades cannot therefore easily be articulated in terms of deductive or inductive logical relationships among pieces of evidence.

I argue for one variant of holism, storytelling theory. Storytelling theorists reject the reason/emotion dichotomy, recognizing that certain "rational emotions" are central to public judgment. Storytelling theorists also appreciate that we are social creatures, for narratives turn on conflicts and connections among individuals and groups. Storytelling theorists thus embrace "dialogic" over linear thinking, recognizing that what does and should persuade can be a function of messy, complex, contradictory thoughts and feelings that escape linear description. To the storytelling theorist, much environmental hardship evidence thus seems relevant, for it explores the social, human side of defendants' lives; builds the tools for the jury to see alternative plausible tales; and encourages jurors to feel the kind of detached empathy—the standing in another person's shoes—necessary to judging mental state.

sue in dispute in the case, and that it will not mislead the jury.
43 F.3d 1311, 1321 n.17 (9th Cir. 1995).
The second broad point I want to make flows from the first: judges, like jurors, engage in dialogic reasoning. Consequently, judges' relevancy rulings reflect their worldviews, emotional predilections, and other often unconscious cognitive processes. Yet one's worldview often reflects one's group affiliations and social position. A judge who is unaware that these factors are at work may consistently undervalue a subordinate group's relevancy arguments because they flow from an alternative worldview. Evidentiary rulings that consistently promote verdicts disadvantaging an oppressed group contribute to that oppression. Relevancy judgments are thus politically charged, reflecting two types of political power—"epistemic" and "social" power—which I define later. I therefore urge judges in environmental hardship cases, which routinely involve the claims of subordinate groups, to explore the political implications of their decisions.

In defending these two ideas, I do not suggest that environmental hardship evidence should therefore necessarily be admitted in particular cases. Rather, I seek only to illustrate how "relevance" can be a question of values, politics, language, and diverse experience, a question worthy of far more attention than it gets.

These speculations are best understood in the context of a hypothetical, to which I will return in each part of this essay. The hypothetical involves a man named John Cheng.

I. The John Cheng Hypothetical

John Cheng is a graduate student in philosophy who killed the members of his doctoral thesis committee. Cheng claims that he was insane, or at least extremely emotionally disturbed, at the time of the crime.

Cheng emigrated from Hong Kong a few years ago. He came from an upper middle-class family there, but his family severed all

12. This hypothetical is based on linguists' research into linguistic domination and accent discrimination, as summarized in ROSINA LIPPI-GREEN, ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY, AND DISCRIMINATION IN THE UNITED STATES (1997). Claims of accent discrimination causing mental illness and distress have been raised in civil rights suits for money damages under Title VII. See id. at 152-70. So far as I know, however, extending these arguments to insanity, as in the Cheng hypothetical, is a novel claim. That is precisely why I selected it. I offer such a detailed hypothetical in the hope that the details themselves help to illustrate some of the points that I want to make: that environmental hardship experts can promote empathy, and that relevancy decisions are partly political judgments.
ties when Cheng refused to join the family business.

Cheng had been an outstanding and privileged student in Hong Kong. But in the United States, he met one disappointment after another. For years, he was unable to get a teaching assistantship ("TA") or office job, finding work only as a bus boy in a Chinese restaurant. When he finally did get a TA position, he got such poor teaching evaluations that his contract was not renewed. His grades were barely passing. He blamed all this on discrimination based on his accent and race, for he was confident that he otherwise had a strong command of English and a talented mind. The rejection of his dissertation was the final straw, and he reacted with violence.

His defense attorney raised a novel defense: linguistic rage. Linguistic rage is rooted in sociolinguistic studies of accent. The studies view "accent" as often not a physical bar to understanding, but an outcome of a social categorization process by which outsider groups are subordinated. Professor Mari Matsuda has described this process as follows:

When... parties are in a relationship of domination, we tend to say that the dominant is normal, and the subordinate is different from normal. And so it is with accent.... People in power are perceived as speaking normal, unaccented English. Any speech that is different from that constructed norm is called an accent. 13

The defense plans to call a linguist to the stand who will testify that this ideology of linguistic subordination is widespread. Accent discrimination thus systematically excludes talented workers from jobs, promotions, and other kinds of recognition for achievement. Yet, after childhood, many adults are physiologically incapable of losing their accents. Moreover, accents are generally not a bar to understanding by those willing to listen. Furthermore, our ways of speaking are central to our social and individual identities, so failed efforts to lose our accents and the resulting ridicule cause great emotional pain.

Additionally, accent and race discrimination are linked. While some Asian-Americans have now achieved visible success in American society, Asian accents activate the worst stereotypes about Asians. In short, "accent, when it acts in part as a marker of race, takes on special significance." 14

The defense also plans to call a psychologist who will testify that,

14. LIPPI-GREEN, supra note 11, at 228.
as a result of accent discrimination, Cheng suffered from a mental
disease or defect, thereby losing the ability to tell right from wrong or
to control his impulses, two tests for legal insanity; Cheng also suf-
fured an extreme emotional disturbance, thereby justifying the miti-
gation of murder to manslaughter.

The prosecution objects on relevancy grounds, arguing first, that
the linguist adds nothing of value to the psychologist's opinion that
Cheng was insane; and, second, that Cheng, not society, is on trial, so
social injustices such as accent discrimination do not matter. The
prosecutor is wrong on both counts because of the linguist's power to
promote "dialogic thinking."

II. Holism and Dialogic Thinking

A. Atomistic Rationalism

Evidence scholarship has long been characterized by a rationalist
tradition. This tradition assumes that there are truths "out there"
that we can accurately discover through the rational weighing of rele-
vant evidence by neutral factfinders. Rationalists assume sharp di-
chotomies between fact and value and fact and law. They see the
primary goal of evidence law as maximizing accuracy in fact determi-
nation. Other criteria, such as speed, cheapness, procedural fair-
ness, humaneness, public confidence, and the avoidance of vexing the
participants may also be taken into account. The primary role of fo-
rensic psychology and forensic science is to offer guidance about the
reliability of different types of evidence and the methods for in-

16. See id. at 72-74. "Rationality" is, however, an aspiration, existing practices and rules
often being criticized for their perceived irrationality. See id. at 75.
17. See id. at 75.
18. "The pursuit of truth (i.e., seeking to maximize accuracy in fact-determination) is to
be given a high, but not necessarily an overriding, priority in relation to other values, such as
the security of the state, the protection of family relationships or the curbing of coercive meth-
ods of interrogation." Id. I nevertheless describe the rationalist position as viewing truth as
"primary" because establishing the truth about past events in a particular case is considered a
"necessary condition for achieving justice in adjudication." Id. Despite the rhetoric about
truth, some have argued that in practice our system often assigns truth a relatively low value, at
least in comparison to the solemn judicial statements to the contrary. See MIRJAN DAMAŠSKA,
EVIDENCE LAW ADRIFT 120-24 (1997). Damaška suggests, however, that we assign truth a
higher value in criminal than in civil cases. See id.
19. See TWINING, supra note 15, at 73.
creasing such reliability. 20

Historically, most rationalists were "atomists," that is, arguments about evidence concerned a logical analysis of the relations between or among individual items of evidence. 21 Wigmore's Chart Method perhaps took atomism to its highest form. This method involves carefully outlining, then charting, how each item of evidence in a case logically relates to other items in promoting conclusions. 22

Atomistic rationalism is usually characterized by linear reasoning. Scholars in this tradition speak of "chains of inferences," each item of evidence leading by a series of inductions or deductions to a particular conclusion. 23 While these conclusions are admittedly not certain ones—they involve probability judgments—these scholars see it as both possible and meaningful to combine probability judgments in reasoning chains. 24

Many atomistic rationalist scholars tend as well to view evidentiary analysis as an exercise in formal or informal logic or mathematics, or at least view evidence as involving a "science of judicial proof." 25 Such analyses are either devoid of discussions of emotion, or emotion is viewed as something to fear, a source of juror "prejudice:" "[T]he harm of unfair prejudice is commonly understood to arise from emotionally charged evidence. A facile dichotomy between cognitive and emotive qualities developed in response to that understanding." 26

Atomistic rationalists are uncomfortable with ambiguity. That discomfort may explain their frequent affinity for the deceptive clar-

20. See id.
21. See id.
22. See id. at 239 ("The [chart] method is in essence an elaborate and vigorous form of rational reconstruction (or construction) of arguments in a manner which involves articulating every step of an argument and mapping the relations between all the parts."). Wigmore also articulated a "narrative method," but he saw it as a sloppy version of atomistic charting rather than a different, more holistic sort of analysis. See id. at 239-42.
23. See id. at 240-41. Twining discusses the relative contributions of inductive and deductive reasoning to rationalist inquiry in TERENCE ANDERSON & WILLIAM TWINING, ANALYSIS OF EVIDENCE: HOW TO DO THINGS WITH FACTS BASED ON WIGMORE'S SCIENCE OF JUDICIAL PROOF 63-69 (1991).
ity of diagrammatic or mathematical representations of evidentiary reasoning. Their belief in a pre-existing objective truth also leads them on a quest for a more certain path to that truth. Thus their scholarship and judicial opinions focus on ways to improve that quest. They debate the likelihood that DNA correctly identifies the perpetrator, that psychologists correctly diagnose insanity, and that lie detectors uncover deception. But each of these inquiries is assumed to have a "right" answer, although one may have trouble in determining that answer in a particular case.

Atomistic rationalists also operate in an institutional environment in which judges see themselves as apolitical umpires seeking to resolve the narrow dispute before them. Judges are reluctant to broaden evidentiary inquiries much beyond the narrow time and place of the incident. Overburdened courts pressed to move cases in assembly line justice are also hesitant to consume judicial time with events temporally or geographically remote from the incident. Each of these aspects of atomistic rationalism has increasingly come under attack. Atomism has been challenged by "holism," the idea that we must consider the mass of trial evidence as a whole and assess its plausibility in a manner that defies analysis of the individual assessment of each evidentiary item's probative value. A variant on holism stresses that there are many "rational" bases for our decisions

27. See sources cited supra note 25.
28. See Twining, supra note 15, at 73-76 (noting that the dominant tone of rationalist scholarship is optimistic, reflecting a belief that the prospects for improving our search for truth about past events are good).
30. See, e.g., Richard Delgado, The Coming Race War? And Other Tales of Apocalyptic America After Affirmative Action and Welfare 29 (1996) ("Law disaggregates and atomizes, even though many grievances have a group dimension. This leaves the litigant lonely and without allies. It encourages him or her to think about his own grievance, not those of the group."). See infra text accompanying notes 98-102 (on judicial distrust of "generalized knowledge").
31. See Andrew E. Taslitz, Myself Alone: Individualizing Justice Through Psychological Character Evidence, 52 Md. L. Rev. 1, 14-20 (1993) [hereinafter Taslitz, Myself Alone] (explaining that institutional forces push courts toward "shallow" case logic); Armour, supra note 1, at 82, 84 (conservative courts and prosecutors seek to narrow the evidentiary time frame to the criminal incident; exclude evidence about social, cultural, and economic conditions; and render the defendant's personal history and attributes irrelevant).
32. See Taslitz, Myself Alone, supra note 31, at 18-20.
that we cannot easily articulate in a systematic manner.\footnote{See id.}

For our own part, we are inclined to believe that the effort to state systematically and comprehensively the premises on which our inferences rest may produce serious distortions in the factfinding process, in part (but only in part) because such systemic statement obscures the complex mental processes that we actually employ and should employ to evaluate evidence. It is not true that we can say all we know, and the effort to say more than we are able to say is likely to diminish our knowledge and the ability to use it. In our daily lives, we confidently rely on innumerable premises and beliefs that we often cannot articulate or explain, but our inability to express these premises and beliefs does not necessarily make them illegitimate or unreliable. The same may be true of many beliefs relied upon in the assessment of evidence by a trier of fact in the courtroom.\footnote{See id.}

One type of holistic analysis making its way into both evidence scholarship and case law views the trial as an effort to craft a meaningful human narrative.\footnote{1A WIGMORE ON EVIDENCE § 37, at 986 (Tillers rev. 1983).} Narrative analysis can better capture how the normally inarticulate aspects of our reasoning can persuade, as Gerald Lopez shows:

While debate over what the facts mean (argument) is encouraged to be more explicitly persuasive than debate over what the facts are (storytelling), argument as an act of persuasion is constrained in most cultures in a way that storytelling is not . . . stories by their very nature can appeal to what is, by convention, still taboo in a culture. Because facts themselves capture and reflect values, what cannot be argued explicitly can be sneaked into a story. Indeed, the genius of story-telling as an act of persuasion is that it buries arguments in the facts. Stories can thereby circumvent the existing constraints on the meaning that can be given to the facts as found. Put differently, relevance is for a story a much looser standard than it is for argument.\footnote{See Twining, supra note 15, at 239-47. Twining apparently views “holism” and “narrative” as distinct theories, but since narrative seeks to explain the meaning and impact of a mass of evidence—one definition of holism—I see the two theories as really variants on the same theme.}

While Lopez views narrative as “sneaking in” factors the law sees as illegitimate, many other narrative analysts argue that embracing narrative is more descriptively accurate and normatively desirable than atomistic rationalism.\footnote{Gerald Lopez, Lay Lawyering, 32 UCLA L. REV. 1, 32-33 (1984).} Jurors will craft plausible stories whether we admit to this reality or not. The question is the degree to

\footnote{See, e.g., NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW 63-78 (1995) (describing research concluding that jurors reason in narrative fashion); see also Taslitz, Myself Alone, supra note 31, at 94-98.}
which we will see that their storytelling is informed or is based on mere speculation. These storytelling theorists view much of human reality as inherently narrative in nature. Mental state in particular is a matter of plausible interpretation, rather than a single truth waiting to be discovered. While storytelling may involve us in a complex form of reasoning that is hard to articulate, we can identify for scrutiny the bases of story-based judgments. Identifying those bases may, however, involve us in inquiries akin to literary criticism, classical rhetorical argumentation, or historical analysis. Logic and traditional notions of science continue to play a role, but they are not all that trials are about.

Good stories, of course, must have emotional appeal. Storytelling theorists and their sympathizers see this not as a criticism but, to the contrary, as a description of good reasoning: “The most persuasive evidence the advocate can offer combines cognitive and emotional qualities,” and “evidence may legitimately have emotional

39. See Taslitz, Myself Alone, supra note 31, at 91-100 (on improving jurors’ storytelling); Andrew E. Taslitz, Patriarchal Stories I: Cultural Rape Narratives in the Courtroom, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 436-37 (1996) [hereinafter Taslitz, Patriarchal Stories] (summarizing experimental data on jurors filling story gaps with their own speculations where the evidence needed to craft a plausible tale is incomplete).

40. See Taslitz, Patriarchal Stories, supra note 39, at 434 (“Stories thus control our understanding, both of our social world and our sense of personal identity.”).

41. William Twining argues that holistic and storytelling theories are at least “open to interpretation as non-sceptical, cognitivist theories that treat the enterprise as one of enquiring about the correspondence of some version of events with a notionally external reality.” TWNING, supra note 15, at 242. He implies, however, by his cautious language, that storytelling theories are also “open to interpretation” as favoring an interpretive, socially constructed definition of reality. I have argued for a middle ground: that storytelling theory is consistent with a realist epistemology for some “facts” but not others. See Andrew E. Taslitz, A Feminist Approach to Social Scientific Evidence: Foundations 5 MICH. J. GENDER & L. (forthcoming 1998) [hereinafter Taslitz, Feminist Approach] (manuscript at 1-83, on file with author). Specifically, I have argued that mental state determination, in particular, involves the crafting of a plausible interpretive story. See id.

42. See Taslitz, Patriarchal Stories, supra note 39, at 439-71 (using social science and the products of high and popular culture to identify themes in cultural and courtroom rape narratives).

43. See id. (using a combination of such inquiries to understand rape trials); see also Taslitz, Feminist Approach, supra note 41 (manuscript at 8-11) (analogizing admissibility questions on social scientific evidence to historical inquiry).

44. Twining correctly points out that atomism, holism, and storytelling theory all share a commitment to internal consistency, compatibility with uncontested or established facts, and coherence with society’s general stock of knowledge as ways to gauge the credibility of a theory or story. See TWNING, supra note 15, at 242. Consequently, he concludes that “both narrative and explicit argument are almost bound to have a place in any prescriptive theory about arguing towards, arriving at, justifying and evaluating adjudicative decisions on disputed questions of fact.” Id.
force, and emotional evidence can be consistent with reasoned delib-
eration."\textsuperscript{45}

Storytelling theorists thus reject the univocal reasoning of ato-
mistic rationalists in favor of more dialogic thinking.

B. Dialogic Thinking

(1) Defining Terms

Although we generally think of dialogue as involving two or
more people, the usage of this word has more recently been extended
to exchanges of voices or viewpoints within a single mind.\textsuperscript{46} Indeed, I
have argued elsewhere that reasoning is best understood as a self-
conversation, an internal dialogue.\textsuperscript{47} Such dialogue often requires
one to hold many sometimes contradictory thoughts and emotions at
once.\textsuperscript{48} For a jury to understand another's mental state, therefore, the
jury must be able to engage in "dialogic thinking." Dialogic thinking
enables a jury to see many perspectives at once, an essential ability in
making the complex, value-based, interpretive assessment of mental
state.\textsuperscript{49}

Dialogic thinking has two essential qualities. First, such thinking
involves reciprocity, the give and take between aspects of the same
mind. Second, dialogic thinking involves strangeness, the shock of
new information, such as from divergent opinion, unpredictable data,
and sudden emotion. These two qualities promote an evolutionary
process by which world views are slowly changed.\textsuperscript{50}

Arguably, our culture, and particularly our legal system, seeks to
promote linear, monologic thinking. Life is presented as a series of
single choices among limited alternatives. We feel weak or ashamed
if we express uncertainty, anxiety, or confusion about the complexity
of things. We instead value forthrightness, consistency, coherence,
and integrity.\textsuperscript{51}

\textsuperscript{45} Jacobs, \textit{supra} note 10, at 578-79.
\textsuperscript{46} See ROBERT GRUDIN, ON DIALOGUE ix, 5 (1996).
\textsuperscript{47} See Taslitz, Feminist Approach, \textit{supra} note 41 (manuscript at 26-44).
\textsuperscript{48} See, e.g., GRUDIN, \textit{supra} note 46, at 36.
\textsuperscript{49} See \textit{id.} (defining "dialogic thinking"); Taslitz, Feminist Approach, \textit{supra} note 41,
at 6-15 (explaining why mental state determination is an interpretive endeavor).
\textsuperscript{50} See Taslitz, Feminist Approach, \textit{supra} note 41, at 12 (defining essential qualities
and significance of dialogic thought).
\textsuperscript{51} \textit{Id.} at 15-20 (describing the linear, monologic nature of our culture); \textit{see also}
RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA
Yet insights from a wide range of sources, from psychology to philosophy to history, suggest that this is all an illusion. “Socially and politically, we inhabit a world of unspoken premises, hidden dangers, subtle contradictions, and quiet intractabilities . . . .” It is only in the multiplicity of these voices that we come to understand life’s issues and each other.

Although our culture generally discourages conscious awareness of dialogic thinking, such thinking is expressed in some of our basic vocabulary. Thus we recognize paradoxes, such as that life is both meaningful and pointless, or that actions are both freely-willed and determined. We use double-entendres to shock others out of their senses of linguistic complacency (that each word has only one meaning) and moral complacency (that social relationships will proceed in a polite, business-as-usual form). We wrestle with irony as a way of confronting us with a pair of contradictory realities. And we rely on ambiguity to remind us of “the different voices—asserting, complaining, accusing, seducing, haunting—that can speak in a single soul.” These linguistic tricks used to encourage dialogic thinking enable us to understand one another’s reality in a way we otherwise would not.

(2) Metaphor

Perhaps the most important familiar example of dialogic thinking is metaphor. The essence of metaphor is understanding and experiencing one thing in terms of another. A metaphor is thus an attribute of thought and not simply a linguistic expression. But metaphorical expressions can activate culturally-embedded metaphors that speak to us with great emotional power. Metaphors and metaphorical expressions reach us in multiple emotional and intellectual ways, “resituat[ing] our experiences in ambiguity, multiplicity, uncertainty, and contradiction.” Metaphors can thus challenge us to


52. GRUDIN, supra note 46, at 19-20 (summarizing the bases of the theory of dialogic thinking).

53. Id. at 26.

54. Bruce A. Arrigo, Rethinking the Language of Law, Justice, and Community: Postmodern Feminist Jurisprudence, in RADICAL PHILOSOPHY OF LAW: CONTEMPORARY CHALLENGES TO MAINSTREAM LEGAL THEORY AND PRACTICE 88, 100-1 (David S. Caudill & Steven J. Gould eds., 1995). The classic analysis of the metaphorical nature of our thinking is GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980). For an analysis of the implications of recent research on metaphor for evidentiary reasoning, see Taslitz, Patriarchal Stories, supra note 39, at 424-29.
rework our ideas of social reality.

In the Cheng hypothetical, jurors are likely to view the case through the metaphors of "criminal as hunter and society as prey," or "criminal as filth." Both are common metaphors by which our society views criminals, metaphors likely to have stronger emotional appeal because they are buttressed by our similar views of immigrants as either scavengers or garbage. None of these metaphors promote the kind of empathy necessary for understanding another's mental state.

The linguist's testimony can help jurors simultaneously to activate an alternative culturally-salient metaphor: "society as bully, defendant as victim." Under this metaphor, society is seen as brutalizing a far weaker opponent, denying him jobs, money, respect, success, based on an irrelevant characteristic—his accent—over which he had no control. He may have overreacted, killing rather than finding a less drastic way to defend himself. But because he was wrongly victimized by a bully, Cheng deserves some measure of compassion. Indeed, whether to mitigate murder to manslaughter ultimately involves precisely the question of whether Cheng deserves the compassion that requires reducing his culpability and punishment.


56. Cf. Taslitz, Patriarchal Stories, supra note 39, at 448-53 (discussing the "bully" metaphor's role in rape cases).

A second relevant pair of metaphors are the "strict father" versus the "nurturant parent." Some cognitive theorists have argued that these competing metaphors guide most Americans' political and moral judgments, and a criminal trial is ultimately a moral/political event. The "strict father" model posits a traditional nuclear family in which the father has the responsibility for setting and enforcing strict rules of behavior. Children must respect and obey parents, and love and nurturance can never outweigh parental authority. Under this view, a criminal like Cheng has disobeyed "society as father" and must be punished. No further inquiry is necessary.

Under the "nurturant parent" model, children's obedience comes from love and respect for their parents. Good communication is key. What children need to learn most to live a fulfilling life is empathy for others and the maintenance of social ties. Strength and self-discipline are viewed as key parts of empathy, social connection, and community responsibility. Parents teach these things by example and by respecting the child's uniqueness. Under this metaphor, society must empathize with Cheng and understand his place in the social web before he can be judged. The linguist's testimony is therefore very relevant.

The point here is that some metaphors are always at work, for we cannot help but think metaphorically. Yet no metaphors are "natural," though the ones under which we traditionally operate may seem so to us. Rather, the metaphors we choose are a function of cultural conditioning, life experience, and value choices. Under one metaphor—the "strict parent"—the linguist's testimony seems irrele-

58. See GEORGE LAKOFF, MORAL POLITICS 11-37 (1996) (defining "strict father" and "nurturant parent" metaphors and their role in political judgment).
59. See infra text accompanying notes 71-114 (explaining political nature of jury trials).
60. LAKOFF, supra note 58, at 65-71.
61. Id. at 66.
62. See id. at 109-10.
63. See id. at 108-13.
64. On the subconscious power of metaphor, see LAKOFF, supra note 58, at 3-37; Taslitz, Patriarchal Stories, supra note 39, at 404-10, 424-29 (linking ideology and metaphor).
vant, while the opposite is true under the “nurturant parent” metaphor. Which metaphor we choose is a value judgment. If we wish to promote the kind of empathic detachment that Adam Smith and Martha Nussbaum call “judicious spectatorship,” which I have elsewhere argued a sound justice system requires, then we should choose the “nurturant parent.” At the very least, we should make room for both metaphors to promote the dialogic thought necessary for determining mental state.

(3) Rational Emotions and Copia

My repeated reference to empathy underscores another aspect of my views on relevance: emotions can be quite relevant to factual inquiry. Some emotional appeals are, of course, illegitimate, but traditional evidentiary jurisprudence treats all emotions as inappropriate. Again, that approach ignores the insights of cognitive psychology. Research in that field demonstrates that the reason/emotion dichotomy is false. Emotion often plays some role in our reasoning. Emotions identify what matters to us and permit us to assign values to what we perceive and do. The emotionless person is an irrational person. Furthermore, emotions are a central part of our moral and social judgments. A justice system devoid of emotion is soon one devoid of the common man’s respect.

65. See Taslitz, Feminist Approach, supra note 41 (manuscript at 63-69) (explaining Smith and Nussbaum’s views and how they shed light on just evidentiary policy); accord MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 53-78 (1995) (explaining why the “judicious spectator” is a good model for jury decisionmaking); ADAM SMITH, THE THEORY OF THE MORAL SENTIMENTS 1.1.4.6 (1774) (defining “judicious spectator”).

66. See, e.g., CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5215, at 230 (Supp. 1996) (denouncing “the misguided attempt to equate ‘prejudice’ with ‘emotion’ and the sloppy intellectual analysis that usually accompanies this.”).

67. On the link between emotion and reason, see ANTONIO R. DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994). On the implications of this insight for expert evidence law, see Taslitz, Feminist Approach, supra note 41, at 21-30. For an argument that recent United States Supreme Court case law and some recent scholarship have come to recognize the importance of emotion to legal, especially evidentiary, reasoning—with particular emphasis on empathy—see Jacobs, supra note 10, at 577-82. One recent philosopher of science rejects entirely, however, the concept of “emotions” as a unitary concept. See PAUL E. GRIFFITHS, WHAT EMOTIONS REALLY ARE (1997). This philosopher divides “emotion” into three distinct categories based upon empirical research. First, there are emotions, such as a brief flaring up of anger in response to some immediate experience, that are evolutionarily ancient, reflex-like responses that appear unmediated by culture. Id. at 77-78, 83. Second, there are higher
Only the most extreme kind of dialogic thinking—"copia"—can promote one kind of emotion, empathy, that is central to a fair criminal trial. "Copia" was originally a classical rhetorical term used by Roman writers like Cicero and Quintilian "to describe a special virtue of great literature: its enthralling, overwhelming richness in... detail [and] variation." But the term "copia" can be extended to describe a way of seeing things, of simultaneously viewing an object of study from every possible angle. To view a person copiously is to understand how he could simultaneously be annoyed, relieved, anxious, worried, ashamed, angry, alarmed, and guilty. But where action is required, such multiple ways of understanding need not lead to paralysis. To the contrary, copious thinking can lead to a new conviction:

To appreciate a subject from every possible perspective, to make a tour of the interpretive means, is to touch the subject, to walk into it, as one might walk into a house that one has seen only from the outside before. To think copiously about a tree is...to know...the abundance of things that trees mean to people. To understand this is to see that for all its variety, copious thinking is often more empowering than it is destabilizing, for when we are in touch with the heart of things, with their human whatness, we can speak and act from the heart ourselves.

Juries may think copiously about matters that judges do not, thus seeing a relevance that judges miss. For example, the law in insanity cases frequently seeks to promote linear reasoning, focused on cognitive emotions, like moral guilt, that differ importantly across cultures, and combine biological, cultural, and experiential factors. See id. at 100-01, 104, 118, 120-21, 132-36. Third, there are emotions that appear to be the acting out of today's psychological myths, social constructions in the sense that they are either reinforced by culture or pretenses that mimic other emotions. See id. at 137-67. The value of this trichotomy is that it demonstrates that what we commonly call "emotions" differ in the degree to which they are comprised of cognitive and cultural, as opposed to biological, components. Moreover, each of the three types of emotions have different evolutionarily adaptive functions and play different psychological roles. See id. at 228-47. This emotion trichotomy therefore lends support to my argument that there are "rational" emotions that should properly play a role in factfinding and "irrational" emotions that should not. See Talitz, Feminist Approach, supra note 41, at 21-28. Of course, labeling an "emotion" as "rational" for factfinding purposes is not only an empirical or philosophical question but also a political and policy question about what role we want particular emotions to play in our public life.

68. GRUDIN, supra note 46, at 35; CICERO, DE ORATORE, XXX.xxxi 125; QUINTILIAN, INSTITUTIONS ORATORIAE, Book X. See also TERENCE CAVE, THE CORNUCOPIAN TEXT (1979) (on literary copia in the Renaissance).

69. See, e.g., GRUDIN, supra note 46, at 36, 46-47.

70. Id. at 49.
a defendant’s state of mind at a single moment.\textsuperscript{71} Experimental data show that jurors in insanity defense cases fail, however, to channel their reasoning along the lines of judicial instructions, regardless of what legal insanity test is used. Rather, the majority of jurors apply their own intuitive constructs of “sanity” versus “insanity.” Those constructs are primarily twofold. First, in order to render a defendant responsible for his actions, jurors make a moral judgment about whether the defendant was sufficiently able to behave differently than he did. Second, if he did not have the capacity to change his behavior, jurors ask this question: to what extent did the defendant, by his own culpable behavior \textit{before} the crime, help to cause his own mental incapacity? Jurors thus deem it highly relevant to learn of the broader personal and social context that led to the crime, to view the criminal act in its full moral complexity.\textsuperscript{72} Jurors will think copiously about these matters whether we give them complete information or not.

Rather than permitting jurors to speculate wildly, we should give them the information they see as important. The precise point of the linguist’s testimony in Cheng’s case is to show that society is at least partly to blame for Cheng’s incapacities. That point is one that judges, like most jurors, should consider “relevant.”

\section*{III. The Politics of Relevance}

This final section explores the role of politics in the relevancy determination. In traditional evidentiary thinking, politics has no proper role in factfinding. Political considerations would taint our quest for a single, objective truth.\textsuperscript{73}

Inez Garcia’s trial judge at her first trial summed up the tradi-

\textsuperscript{71} See, e.g., 21 AM. JUR. 2d CRIMINAL LAW § 52 (1981) (noting that the inquiry in an insanity defense case “must be directed to the defendant’s capacity \textit{at the time the act was committed}” (emphasis added)). I am not arguing here for a change in this legal standard for insanity, which focuses on the defendant’s mental state \textit{at the time of the crime}. Rather, I am arguing that jurors cannot, often will not, and certainly should not make the judgment whether a defendant was insane at the time of the crime without information about events long before the criminal act.

\textsuperscript{72} See NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW 286-97 (1995) (summarizing research on jurors’ notions of insanity). Finkel goes on to note that “this capacity-responsibility judgment is common to situations that have little to do with insanity per se, indicating that this culpability judgment is commonplace and widespread.” \textit{Id.}

\textsuperscript{73} See Robert P. Mosteller, SYNDROMES AND POLITICS IN CRIMINAL TRIALS AND EVIDENCE LAW, 46 DUKE L.J. 461 (1996) (rebuttering in some respects the traditional view).
tional view well. Garcia had killed her rapist out of fear of further abuse. She sought, in raising a psychiatric defense, to focus on rape and how society’s failures to protect women from rape and to convict their assailants leaves women few options other than violence. The judge barred most evidence relevant to her defense as irrelevant. “We are not trying a cause,” the judge said, “we are trying a woman, Mrs. Garcia, and I am not going to make this courtroom a forum for a cause.”

The criminal courtroom, I will argue, is often a forum for a cause, whether we want it to be or not. Every decision admitting or excluding evidence has political consequences. This section begins by explaining in general terms why relevancy judgments are political. The section then elaborates on this explanation by defining and illustrating two types of evidentiary political power: epistemic power and social power.

A. Why Relevance is Political

That relevancy judgments are political is suggested by the work of cognitive language theorists. These theorists recognize that laymen’s notions of relevancy vary based on each layman’s social context. One man’s relevance is another man’s waste of time. Relevancy judgments are thus not purely logical but reflect our deepest moral, political, religious, and cultural assumptions. Feminist theory suggests similar conclusions:

Feminist legal scholars reject the assertion that the concept of relevance is simply a matter of logic, unaffected by the substantive law or the perspective of the individual judge. A model of individual will is assumed, in which individual decisions may be affected by circumstances in the particular case, such as constraints from the ‘bad motivations of other individuals,’ but which does not recognize

74. HARRIS, supra note 1, at 198-99 (discussing Garcia’s case and quoting the trial judge).
75. To observe that politics always plays a role is not to concede that this is always a good thing. I have argued elsewhere that epistemic and social power are clearly normatively desirable considerations only when determining mental state in criminal cases. See Talitz, Feminist Approach, supra note 41, at 120-27. For other issues, the normative desirability of politics’ playing a role is more dicey. Yet, even when we think that politics should not play a role, we must be aware of its operation to reduce its impact. Here I use some examples that arguably do not involve the mental state inquiry. My ultimate point, however, is that to the extent that an argument can be crafted that such cases should involve political analysis, the argument is far stronger when determining mental state.
constraints imposed by history, socialization, class, race or gender.77

Cognitive language theorists also view relevancy as an economic judgment: Is the cognitive cost of computing probative value (what the language theorists call “contextual effects”) worth the perceived likely benefit? Again, this is a value-laden judgment. Yet we are generally not consciously aware of the thinking processes underlying our relevancy judgments. Consequently, we may view as simple logic what is in fact a particular manifestation of our cultural and political biases.78

Evidence law sometimes implicitly recognizes this last insight, viewing relevancy conceptions as “a subjective matter, dependent on the individual observer’s own personal assessments.”79 The law responds with a conception of how the “reasonable person” would perceive the probabilities.80 But critical legal scholarship has shown that the “reasonable person” is a value-laden construct, often used to mask policy choices and exercises of political power.81 A judge not fully aware of these realities may simply view as “common sense” his judgment that an item of evidence is irrelevant. Where controversial matters like racism, sexism, and the like are involved, as with environmental hardship defenses, “common sense” may simply reflect ignorance or subconscious cognitive biases.82 A judge should make a more careful, candid, searching inquiry.

At the very least, the judge should consider that the differing epistemic visions of different impacted groups may result in different relevancy judgments. For example, in the O.J. Simpson case many blacks and whites differed—having a different “common sense” of the degree of probative value, if any, to give to evidence of prior wife-beating by Simpson and of police abuses.83 The judge should also, as with many “reasonableness” inquiries, determine the social impact of labeling one view of relevance “reasonable,” and others


80. Id. at 61-63.


82. See, e.g., ARMOUR, supra note 1, at 115-41.

Candor about the political implications of the seemingly "logical" relevancy judgment is therefore key, something that Inez Garcia's first trial judge did not understand.

The political implications of relevancy judgments are better illustrated by examining two types of political power: "epistemic" and "social" power.

B. Epistemic Power

Epistemic power arises from judges and jurors bringing preconceptions and cognitive schemes to their task. Those preconceptions and schemes are rooted in cultural stories and class, race, and gender-based experience. Consequently, members of different groups often share particular visions of reality. But visions that prevail with any consistency benefit one group—channeling social resources, like physical freedom, money, and other kinds of power to it—often at another group's expense. When one group's world vision prevails, that group has "epistemic power." Evidence rules thus create epistemic power both because they affect which social visions of reality prevail and who benefits thereby.

We can shed light on epistemic power by comparing two common situations discussed in progressive law students' views of first year Criminal Law.

The first situation involves a battered woman shooting her sleeping husband. The second, a variation on the infamous Bernhard Goetz case, involves a subway vigilante shooting a black teenager who asks the vigilante for a dollar while the two ride a subway car. The vigilante had been mugged and beaten once before by a black male teenager. This mugging, says the vigilante, taught him to fear black males.

Both woman and vigilante claim self-defense. The woman proffers a battered woman syndrome expert, the man a "reasonable rac-

84. See infra text accompanying notes 101-105.
85. See Taslitz, Feminist Approach, supra note 41, at 120-27 (also more fully defending the concept of epistemic power, but in a context other than relevancy).
86. See id. at 120-21.
87. Id. at 120.
88. Id. at 121.
89. See id. at 120-27.
90. See id. at 120-27 (defining "epistemic power").
Who should prevail? Progressive law students say the woman but not the vigilante.

Mark Kelman suggests two possible epistemic justifications for the students' views. First, students may believe that the woman's perception of her own danger was more accurate than the vigilante's. Second, adopting a "hyperskeptical multiculturalism," the students believe that we can never know "truth." At best, we know only what passes for truth in a particular subculture. We need to educate juries about the subcultural positions of battered women but not of dominant white men.

(1) The Hyperskeptic

The hyperskeptical position suffers from the potential flaw that it provides no clear ground for favoring the woman over the man. There are, says Kelman, "subcultures in which the battered woman's descriptive visions and normative pleas resonate and subcultures in which the subway killer's do." One possible way to resolve this problem is to give those groups a say who have the weakest political voices. Even realists can agree that this makes sense, on the ground that truth cannot emerge unless different people with different perspectives are allowed to speak. That is what the jury system is supposed to be all about; it also undergirds the system of checks and balances. The basic idea may well point toward efforts to reform existing institutions—but precisely in the name of truth.

But Kelman sees a more overtly political justification for amplifying group voices, even in a hyperskeptical world. He writes:

[T]he essential political task is to insure that each subculture's voice is adequately heard. Thus, in the context of legislatures, we might see multiculturalists demand corporatist, proportional representation schemes. In the context of jury trials, the context we are most concerned with here, the notion would presumably be that the subway killer will get an adequately sympathetic hearing without the aid of expert testimony or cautionary instructions, while the bat-

92. The hypotheticals described here are variations, changed to stress the expert evidence issues, of those articulated in Mark Kelman, Reasonable Evidence of Reasonableness, in QUESTIONS OF EVIDENCE: PROOF, PRACTICE, AND PERSUASION ACROSS THE DISCIPLINES 169-88 (James Chandler et al. eds., 1994). On the notion of the "reasonable racist," see ARMOUR, supra note 1, at 19-34.
94. Id. at 177.
tered woman’s claims will be unduly discounted and marginalized unless we make special efforts to bolster them. There may be no ultimately objective view of risk determined by evidence; given, though, that a political body (the jury) exists with the power to validate certain views, it must be manipulated to treat each inevitably partial understanding as equally weighty.96

Kelman’s insight has profound practical consequences, for if hearing battered women’s voices leads to acquittals and funnels more resources to studying and correcting the problem of battering, then battered women as a group gain power. The trial is thus inevitably another site at which group visions contend for epistemic dominance as part of the struggle for power.97

(2) The Realist

Switching again from a hyperskeptical to a realist epistemology allows us to examine the progressive students’ first justification for treating the battered woman and the vigilante differently: that the woman’s assessment of danger is more accurate. This judgment, says Kelman, reflects our legal system’s strong preference for “local” over “general” knowledge. “Local” knowledge is the knowledge of particulars, of persons, places and things in the particular case. “General” knowledge is of patterns and probabilities in individual, group, and social behavior.98

The battered woman knows her husband well, having felt his blows, having learned the meaning of a twitch of his lip or a glint in his eye. That is local knowledge. The subway vigilante, by contrast, does not know his victim but relies primarily on generalized, racist stereotypes.

Is it so clear, however, that we always can or should privilege local over general knowledge? From the subway vigilante’s perspective, he has much local knowledge. He has been mugged on the subway himself, has spoken to other victims, has seen others mugged. He has learned from these direct observations of danger. He trusts this knowledge.

On the other hand, the battered woman’s local knowledge may be flawed. In the early period of battering, she may underestimate the danger, for she does not want to think ill of one she loves. Moreover, some battered woman syndrome theorists apparently con-

96. Kelman, supra note 92, at 178.
97. See also ARMOUR, supra note 1, at 81 (making a similar point).
98. See Kelman, supra note 92, at 183-88.
cede that the woman’s estimates of the danger that she faced were wrong, though understandable.99

Other battering theorists see the battered woman as hyperrational, as having an understanding of danger that the rest of us cannot comprehend.100 For these theorists, we must understand the entire system of patriarchal oppression of women through violence in order to appreciate the danger that this woman was in. Only then can we realize that her fears were justified. Yet the study of patriarchal oppression is a form of generalized knowledge.

By comparison, these same theorists would likely reject the vigilante’s claim to general knowledge—that black teenagers are dangerous—as empirically wrong and morally unacceptable.101

Moreover, we cannot reason without using a great deal of generalized knowledge.102 Sometimes local knowledge may be better, sometimes general, most often both. Yet we continue to hold an aversion to generalized knowledge in fact-finding, an aversion that may explain the resistance to environmental hardship defenses. Those defenses by definition rely on testimony about general social conditions.

Our legal system’s aversion to the role of generalized knowledge in factfinding is an exercise of “epistemic power.” Proof processes that focus solely on local knowledge divert attention from underlying social issues. If we care only about whether Sally killed her abusive husband, John, we need not explore the patriarchal underpinnings of a social system that too often condones violence against women. If, on the other hand, we do explore that social system, we may see that Sally is not fully responsible for her actions. Her actions are partly determined by an unjust set of societal institutions. But if the limitations created by an unjust society are exposed, pressure is created for social change. Such change would shift resources, affecting the distribution of freedom, money, education, self-respect, and raw power

99. See Taslitz, Feminist Approach, supra note 41, at 77-81 (describing critiques of battered woman syndrome as “pathologizing” women).
100. See id.
101. These analyses of local versus generalized knowledge are largely drawn from Kelman, supra note 92, again with some of my own modifications. I am not sure that I agree with Kelman that our legal system consistently undervalues generalized knowledge, though it clearly does so often. But I assume the accuracy of his assertion for the purposes of illustration in this essay. Kelman does not explore the political implications of his assertion in quite the way that I do.
102. See ANDERSON & TWINING, supra note 23, at 66-67 (“Background generalizations provide the basis for these and most, if not all, inferences.”).
among groups. Evidentiary rules that discount generalized knowledge as irrelevant therefore favor the status quo. The dominant group's vision of reality prevails, maintaining that group's power.

C. Social Power

The battered woman–subway vigilante hypothetical also demonstrates the concept of "social power." Social power arises because every factual judgment contains a risk of error. But the same size risk should be weighed differently depending upon the consequences of a mistake. Social power asks what the consequences of such a mistake are for society as a whole rather than for any group or individual. ¹⁰³

Assume, for example, that the exclusion of battered woman syndrome and reasonable racist syndrome leads to erroneous acquittals 20 percent of the time each. We might perceive very different consequences for society of acquittals in the two types of cases. Acquitting the subway killer sends the message that black males are entitled to less physical safety than whites. But blacks, in turn, might limit the places that they go and the things that they do to avoid assault. This is particularly reprehensible because of a history of discrimination and physical abuse of blacks. While blacks as a group are harmed, therefore, so is society. A society that condones creating separate social castes is less caring, denying the value of equal respect for all human beings. Moreover, greater inequality breeds resentment and poverty, in turn leading to greater social tension and crime. Furthermore, we simply cannot know with confidence what the teenagers would have done if the vigilante had not shot. The teens may be perfectly innocent, or merely rude or unruly. Permitting the wounding of teens not proven to have committed a wrong to go unpunished breeds general disrespect for the law. ¹⁰⁴

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¹⁰³. See Taslitz, Feminist Approach, supra note 41, at 47-50 (defining "social power"). ¹⁰⁴. Kelman makes some of these points, but his emphasis is different. He stresses the risk of the vigilante or the woman being in error about the physical danger they each faced from their perceived assailants; that is, he focuses on "reasonableness" as concerning the accuracy of a defendant's beliefs about the physical world. See Kelman, supra note 92, at 183-88. I stress the risk of the jury being in error about either the defendant's mental state (that is, whether the defendant had the alleged belief in the first place) or its reasonableness. See Cynthia Kwi Yung Lee, Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 MINN. L. REV. 367 (1996) (explaining that self-defense requires judgments that a suspect had the relevant mental state and that both it and the suspect's actions were reasonable). Moreover, unlike Kelman, I view reasonableness as a normative question that turns on more than the accuracy of the defendants' beliefs that they were in danger. For example, the degree of choice available to a defendant, given
The consequences of acquitting the battered woman are arguably far less. We know that she was indeed battered. Her husband was not innocent. We therefore regret errors less. Moreover, although any error suggests a failing of the justice system, that failing should not be perceived as buttressing a domination system. To the contrary, the verdict will likely be received as reflecting community compassion for a woman who may have over-reacted in the face of intense suffering. Erroneous acquittal of the wife does not, therefore, raise any social concerns different from those in a wrongful acquittal of any other killer. But social power expands our awareness of the political consequences of evidence law to include unequal respect, shattered relationships, blocked catharsis, reduced caring, indeed any social costs associated with evidence law. We should take those social costs into account in crafting rules governing whether to permit expert testimony in the battered woman and subway vigilante cases.

D. John Cheng and the Politics of Relevance

These two concepts of evidentiary politics help to elucidate the John Cheng hypothetical. Cheng's novel claim seems implausible at first, a claim manufactured to free an obviously guilty man. How could simply having an accent drive a man so over the edge as to render him legally insane? This claim does not fit dominant narratives. But a fuller understanding of the system of linguistic domination portrays a very different social vision. That vision is one in which language and race combine systematically to exclude, denigrate, and oppress the innocent. Moreover, the method of domination—accent discrimination—is particularly cruel, striking at the heart of our sense of self-identity. In this vision, Cheng's acts can better be understood as more determined than willed, therefore more insane than sane.105

Furthermore, ignoring this alternative vision hides the robbing of bright, talented immigrants' futures by their unfair exclusion from jobs and income. To hold the "linguistic rage" expert's testimony irrelevant is an exercise of epistemic power, embracing the status quo and worldview of the dominant group.

Such an embrace also has broader social implications, condoning her perceived life circumstances, is relevant to reasonableness. In any event, either Kelman's emphasis or mine raises many very similar "social power" concerns, although I think that my emphasis creates a more defensible argument for taking politics into account in crafting evidentiary rules.

105. See generally LIPPI-GREEN, supra note 12.
precisely the kind of social caste system that "reasonable racist" subway vigilantes help to promote. Immigration becomes true second class citizens, exposing as a lie the American promises of equal opportunity and denying our economy the most productive use available of its resident alien labor. It would be an appropriate exercise of social power to reduce these costs by permitting Cheng to tell his tale.

Finally, Cheng has a stronger political claim than either the vigilante or the battered woman. The latter two defendants made claims partly about the physical world: that they were about to be assaulted. Cheng seeks only to prove his mental state. Mental states, as noted earlier, do not exist "out there" but are interpretive acts. There is no single, universally true answer to the question, "What was Cheng's mental state?" Therefore, we should give multiple plausible answers to that question a fair hearing.

Conclusion

This essay has sought to illustrate that the relevance of expert testimony is not a simple matter of logic. Rather, relevancy determinations reflect cultural and political biases. If lawyers are more alert to those biases, they may be more effective in conveying to judges alternate ways to view evidence as relevant.

106. See Sunstein, supra note 95, at 189-96 (on the caste-system and the subway vigilante).

107. See sources cited supra note 55 (discussing treatment of immigrants in America); RONALD TAKAKI, STRANGERS FROM A DISTANT SHORE: A HISTORY OF ASIAN AMERICANS (1989) (tracing the ways in which society has long denied Asian-Americans equal opportunity).

108. Critical legal and other scholars have long argued for expanding doctrinal arguments made to courts to include overtly political judgments. See, e.g., John Fellas, Reconstructing Law's Empire, 73 B.U. L. REV. 715, 716 (1993); David Luban, Difference Made Legal: The Court and Dr. King, 87 MICH. L. REV. 2152, 2153 (1989); John C. Williams, Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells, 62 N.Y.U. L. REV. 429, 432 (1987). But the critical theorists' approach need not be followed for lawyers to make practical use of the insights offered here. First, explaining how emotions matter or the differences between "local" and "general" knowledge can fit within standard arguments that "relevant" matters are those that alter the probabilities of a fact of consequence. Second, pointing out unsupported preconceptions underlying a ruling of irrelevancy may move a judge to change his mind. Third, to the extent that relevancy is viewed as a matter of degree, as is expressly true under Rule 403, balancing necessarily invites a weighing of a wide-ranging set of considerations, a policy judgment about what evidence is really important and why. Political arguments, even if couched in terms of alerting the court to previously unarticulated assumptions that may "prejudice" the court's analysis, may have some impact on how a judge weighs the balance. Finally, even
Moreover, judges should view as relevant evidence that appeals to certain rational emotions and that helps jurors engage in the kind of dialogic thinking central to fair judgment. Images of ideal jurors as cold, logical calculators are both inaccurate and unjust. Indeed, the United States Supreme Court seems recently to have recognized this insight in *Old Chief v. United States*.

There, Old Chief was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(a)(1). The prosecutor refused to stipulate that Old Chief had a prior felony conviction. The trial court thereafter denied Old Chief's motion to limit testimony about his prior conviction to the information offered in his stipulation. The name and nature of his prior conviction, for assault causing serious bodily injury, were revealed at trial, and Old Chief was convicted on all counts. The Ninth Circuit, on appeal, found no abuse of the trial judge's discretion, but the Supreme Court disagreed, reversing that judgment.

In doing so, however, the Court stressed that evidence may be probative simply because it aids the telling of a "colorful story with descriptive richness." Moreover, evidence may address many elements at once, having "force beyond any linear scheme of reasoning," because of the special "persuasive power of the concrete and particular." This persuasive power, the Court noted, is partly due to the evidence's emotional appeal:

When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact, but to establish its human significance, and so to implicate the law's moral

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109. I am not suggesting that the law behaves as if we believe jurors are coolly logical. To the contrary, the law fears that they are emotional and irrational. My disagreement is that the law strives to move jurors toward a kind of cold logic that is neither attainable nor desirable. See *supra* text accompanying notes 46-72.


111. *Id.* at 653.

112. *Id.* By "non-linear" reasoning, the Court was addressing how an item of evidence may simultaneously tend to prove multiple elements of a crime rather than, as in this essay, tending to demonstrate multiple aspects of a single element such as mental state. Nevertheless, the Court's language shows a sensitivity to the idea of multiplicity—many truths in a single item of evidence—over linearity. Moreover, the Court stressed the importance of developing a rich, full narrative, again suggesting a receptivity to dialogic thinking.

113. *Id.*
underpinnings and a juror's obligation to sit in judgment.\textsuperscript{114}

What this essay has sought to argue in part is precisely that some evidence matters because it establishes the "human significance" of facts and implicates the law's "moral underpinnings." While these considerations ultimately did not prevail on the facts before the Court in *Old Chief*, the Court has suggested that it will be receptive to appeals to "non-linear reasoning schemes" and rational emotions in appropriate cases. This essay has sought to sensitize lawyers and scholars to the need to take that invitation seriously.

In this conclusion I also want to suggest one final lesson: our relevancy instincts and teachings may affect how we think about reliability. If we favor linear forms of reasoning and insist on a realist conception of mental states—one in which there is a single, objective answer "out there" to the question, "What is the defendant's mental state?"—we promote linear, realist conceptions of science. In particular, we will be receptive to notions like Karl Popper's which limit "science" to testable statements. Furthermore, we tend toward a monolithic view of science as meaning \textit{only} the cool logic of Popperian thinking. Anything else seems of little relevance.\textsuperscript{115} Yet we sense, as did the *Daubert* Court, a link between relevance and reliability. Completely unreliable theories have little, if any, chance of making facts of consequence more or less likely and are, therefore, not relevant. Correspondingly, if we start with the belief that evidence is either unconnected to the issues before us or unlikely to alter their probability, it is hard to see them as trustworthy.

A broader conception of relevance recognizes that mental state determination is not a realist endeavor but an interpretive act. Such an act requires empathy, understanding in an emotionally powerful way the defendant's life story. But empathy requires multiplicity rather than linearity, knowing and feeling the many truths simultaneously present in a single human life. Non-Popperian interpretive social science, such as is practiced by many linguists, psychologists, and sociologists, can sometimes more effectively convey this multiplicity in a way that science modeled on the laboratory cannot.\textsuperscript{116} John Cheng's thoughts and feelings cannot come to life in a laboratory, a survey, or a regression analysis. But his world can come to life in the

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\textsuperscript{114} Id. at 653-54.

\textsuperscript{115} For an analysis of expert evidence law's obsession with universalist, realist, Popperian notions of evidence law, see Taslitz, Feminist Approach, supra note 41, (manuscript at 3-12, 20-25, 45-47) and sources cited therein.

\textsuperscript{116} See id. at 113-18.
story of historical white domination of Asian immigrants and the systematic abuse wrought by accent prejudice and racial abuse. If we see that story as relevant, we will be far more open to judging its reliability fairly.

This last point relates squarely to Daubert's notion of "fit." Remember that "fit" reminds us that scientific validity for one purpose does not mean validity for other, unrelated purposes. But our "relevancy" conceptions affect the purposes for which we believe evidence is being offered. If we see promoting rational emotions like empathy, encouraging dialogic thinking, and giving group visions political voice as legitimate, relevant uses of expert testimony, our notion of "fit" changes. While an interpretive social scientist may be poor at predicting an individual instance of human behavior, he may be very good at powerfully conveying what life is like for Asian immigrants. For that purpose, his testimony might be quite valid, thus "fitting" quite well. Because "fit" links relevance to scientific validity, that is, evidentiary "reliability," we can see how our relevancy conceptions may mold our reliability notions as well. In applying Daubert, therefore, we must be much more alert to how our own cognitive and political biases affect whether we deem expert testimony "relevant and reliable."

117. See supra text accompanying note 6.