

Ockham's Razor in American Law

R.H. Helmholtz*

I.	INTRODUCTION	110
II.	FREQUENCY OF CITATION.....	112
III.	SOURCE OF CITATIONS.....	114
IV.	JUDICIAL ATTITUDES TOWARDS OCKHAM'S RAZOR.....	115
V.	THE SEVERAL USES OF OCKHAM'S RAZOR.....	116
	A. <i>Statutory Interpretation</i>	116
	B. <i>Ockham's Razor as a Scalpel</i>	118
	C. <i>Choice Among Legal Rules</i>	119
	D. <i>The Law of Evidence</i>	121
VI.	CONCLUSION	123

Over the years, Shael Herman and I have shared common and miscellaneous interests. We have discussed them in conversations I recall with unalloyed pleasure. Among other things, ancient legal principles and maxims, particularly those with a comparative dimension, have attracted his attention and mine,¹ and when I received a kind invitation to contribute to a Festschrift in his honor, I thought it might provide a good occasion for having a look at what legal use had been made of an old saw about which I had wondered: Ockham's razor.² An investigation might prove interesting. Who knew? It might even lead somewhere. Although I could not remember that it had occupied any place in my own legal education,³ perhaps there was something to be learned from examining its status in modern American case law. Having made the examination, I am bound to confess that nothing of earth-shaking significance turned up, but what I found proved interesting to

* Ruth Wyatt Rosenson Distinguished Service Professor of Law, University of Chicago.

1. See, e.g., Shael Herman, *Pacta sunt servanda et contraintes commerciales: L'exécution des promesses en droit espagnol et en droit américain*, in DE TOUS HORIZONS. MÉLANGES XAVIER BLANC-JOUVAN 521 (Société de législation comparée 2005).

2. The initial impetus for wonderment was a suggestion from a learned uncle of mine, Howard Burchell, M.D., who told me that Ockham's razor was often applied in medical diagnoses, but he added quickly that he had the impression that it was often misapplied. He suggested it as a suitable subject for legal investigation, and I am grateful to him for this suggestion.

3. Others apparently have had different experiences; see, e.g., H. Bartholomew Cox, *In Memoriam: Arthur Selwyn Miller*, 57 GEO. WASH. L. REV. 1445, 1450-51 (1989).

me, and I hope that some of my discoveries, modest though they are, will also be of interest to Shael.

The research involved was not a labor of Hercules. American case law has gone online since I first conceived an interest in the subject. The new tool makes it possible to ferret out mentions of Ockham's famous razor with a completeness it would have been quite impossible to achieve even fifteen years ago. I quickly discovered a few unexpected things—for instance, that the spelling "Occam" is much more often used in judicial opinions than the spelling "Ockham" to which I was accustomed. So encouraged, I plunged ahead.

I. INTRODUCTION

William of Ockham was English. He was born about the year 1287 in a village of that name (or Oakham) in Surrey, northeast of Guildford.⁴ He entered the Franciscan order in his teens, studied and subsequently taught in a theology faculty, probably at Oxford. In 1324 he crossed the English Channel to answer charges that parts of his teaching were erroneous, having been summoned to appear before the papal court at Avignon. No stranger to controversy, he landed in further hot water in 1328 when he reached the conclusion (and argued publicly) that the position taken by the reigning pope, John XXII, on the then contentious issue of the nature of poverty professed by Christ and the Apostles was erroneous, indeed heretical.⁵ In consequence, Ockham was forced to flee northwards to Germany and place himself under the protection of the emperor, the leading political opponent of the pope, Ludwig of Bavaria. Undeterred by papal anathema, Ockham lived and wrote in a Franciscan convent in Munich near the imperial court until his death in 1347.

Ockham is an important figure in the history of philosophy, theology, and political theory.⁶ The razor for which he is best known among laymen and which is the subject of this paper, is basically a principle of parsimony. It holds that "plurality should not be assumed without necessity." This is taken to mean that complicated explanations of observed phenomena should not ordinarily be accepted without proof

4. For a succinct biography, see W.J. Courtenay, Ockham, William (c.1287-1347), *Oxford Dictionary of National Biography* (Oxford University Press, 2004), available at <http://www.oxforddnb.com/view/article/20493> (last visited 21 Dec. 2004).

5. See I GORDON LEFF, *HERESY IN THE LATER MIDDLE AGES* 294-307 (1967).

6. See ARTHUR S. MCGRADE, *THE POLITICAL THOUGHT OF WILLIAM OF OCKHAM* (1974); RICHARD SCHOLZ, *WILHELM VON OCKHAM ALS POLITISCHER DENKER* (1944); E.F. Jacob, *Ockham as Political Thinker*, in *ESSAYS IN THE CONCILIAR EPOCH* 85 (1963).

of their necessity.⁷ Simpler explanations are to be preferred. To be sure, a preference for the simple over the more complex was not original with Ockham. It was known to Aristotle.⁸ Others used it. Nor apparently did Ockham ever actually make use of the metaphor of a razor in describing how he attacked philosophical questions. However, the consensus of scholars holds that there are good reasons for associating the method of analysis associated with a razor with Ockham.⁹ It fits his habitual method of approach.

Today its use has extended beyond philosophical and theological circles. Scientists, particularly M.D.s, have found it attractive.¹⁰ As I understand it, the principal use made of Ockham's razor in medicine is as a tool in the diagnosis of illness. It is said that no diagnosis can be entirely certain. In the absence of indications to the contrary, therefore, it may make sense to choose the simplest explanation to account for observed symptoms of disease. More complicated possibilities are shaved off with the razor. This seems fair enough—as a starting point. I have not delved very far into the use made of Ockham's razor by the medical profession, looking only far enough to see that the subject has attracted the attention of doctors,¹¹ and also that a certain playfulness has crept into their discussions. The medics have asked, for example, whether Ockham's razor could properly be considered a disposable razor.¹² Ignorance, however, kept me from following this path very far. My own inquiry has been only to see what use of it has been made by American judges. And in recent years there has been some.

7. *Pluralitas non est ponenda sine necessitate*, Ordinatio I, d. 30 q. 2, in 4 WILLIAM OF OCKHAM, *OPERA THEOLOGICA* 322 (G.I. Etzkorn & Francis Kelly eds., 1979).

8. See PHILOTHEUS BOEHNER, *COLLECTED ARTICLES ON OCKHAM* 155 (Eligius Buytaert ed., 1958); D.E. SHARP, *FRANCISCAN PHILOSOPHY AT OXFORD IN THE THIRTEENTH CENTURY* 287 (1930).

9. 1 MARILYN McCORD ADAMS, *WILLIAM OCKHAM* 156-61 (1987); GORDON LEFF, *WILLIAM OF OCKHAM: THE METAMORPHOSIS OF SCHOLASTIC DISCOURSE* 35 (1975); Armand Maurer, *Ockham's Razor and Chatton's Anti-Razor*, 46 *MEDIAEVAL STUDIES* 463 (1984). More skeptical about the justice of its attribution to Ockham are W.M. Thorburn, *The Myth of Occam's Razor*, 27 *MIND* (n.s.) 345 (1918), and Roger Ariew, *Ockham's Razor: A Historical and Philosophical Analysis of Ockham's Principle of Parsimony* (1976) (unpublished Ph.D. dissertation, University of Illinois) (on file with University of Illinois Library).

10. See, e.g., Robert Epstein, *The Principle of Parsimony and Some Applications in Psychology*, 5 *INST. MIND & BEHAV.* 119 (1984).

11. An online search of Medline conducted 21 December 2005 produced forty-eight articles with titles using the phrase "Ockham's razor" between 1960 and that date.

12. Peter Tatham, *Is Occam's Razor Disposable?*, 80 *J. ROYAL SOC'Y OF MED.* 331 (1987); see also Bryan Young, *Don't Get Cut on Occam's Razor*, 32 *CANADIAN J. NEUROLOGICAL SCI.* 137 (2005).

II. FREQUENCY OF CITATION

An initial surprise came in discovering how recent judicial interest in Ockham's razor was. Commentators have sometimes assumed that its use in American law must be of long standing.¹³ Ockham himself lived centuries ago. The maxim known by his name has always been common coin in many circles. Despite this, the principle invoked under his name turns out to be a recent arrival in our case law. Not a single citation of Ockham's razor turns up in an online search of opinions from the nineteenth century, and for the first half of the twentieth century, there are only four mentions to be found, all of them from the 1940s.¹⁴ What's more—all of the four that do appear in the reports come from the pen of the same man, the famous realist firebrand turned federal judge, Jerome Frank. Otherwise, the page of entries for Ockham's razor in our case law is entirely blank until the 1960s, when John Minor Wisdom, the distinguished Fifth Circuit judge, used it tactically in two of his opinions.¹⁵

Indeed it was not until the 1990s that the maxim began to be used with any frequency by American judges, state or federal. But it has since taken off. The current trajectory is decidedly upwards. Almost three times as many citations of it appeared in the 1990s as had occurred in the 1980s, and it looks as though the first decade of the twenty-first century will outstrip all previous decades. By the waning days of 2005 there had already been twenty-eight judicial opinions in which Ockham's razor figured in some way, actually one more than appeared in the 1990s as a whole.¹⁶ Moreover, not all of the recent usage can be explained by the enthusiasm or one or two judges. Citation of Ockham's razor has been spread between state and federal courts, with slightly more of the latter than the former. More judges overall are making use of it. As yet, judicial mention of the razor can scarcely be called a flood. All the same, it now amounts to more than a trickle.

A brief look at American law reviews presents an even more startling ascent in popularity. The number of cites to Ockham's razor in

13. Gregory Coleman & James W. Paulsen, *Civil Procedure*, 28 TEX. TECH. L. REV. 331, 333 (1997) ("In light of the principle's long use by courts . . .").

14. *McComb v. Frank Scerbo & Sons, Inc.* 177 F.2d 137, 141 (2d Cir. 1949) (concurrency); *Clark v. Taylor*, 163 F.2d 940, 951 (2d Cir. 1947) (dissent); *Martin v. Campanaro*, 156 F.2d 127, 131 (2d Cir. 1946); *Picard v. United Aircraft Corp.*, 128 F.2d 632, 638 (2d Cir. 1942) (concurrency).

15. *Brown v. Beto*, 377 F.2d 950, 953 (5th Cir. 1967); *Ala.-Tenn. Natural Gas. Co. v. Fed. Power Comm.*, 359 F.2d 318, 335 (5th Cir. 1966); *see also* *Brown v. Vance*, 637 F.2d 272, 281 (5th Cir. 1981) (using Ockham's razor to interpret the choice of judges before whom to try offenders made by arresting officers).

16. As of 21 December 2005 as shown by a Lexis online search.

them has gone from nowhere at all to something approaching scholarly popularity. In the 2000s, so far there have been 134 citations. Between 1980 and 2000, there were 305, while between 1960 and 1980, there were 122. Before that date, however, there were many fewer. The twenty years between 1940 and 1960 produced sixty citations. Between 1918 and 1940 only twenty-five were found.¹⁷ Of course, a part of this increase is deceptive. Many more law reviews are being published today than was true in the 1970s and before.¹⁸ And the range of interests found in them now extends farther afield than legal doctrine that used to take center stage in their pages.¹⁹ Nonetheless increase in total numbers and expansion of interests among authors alone cannot alone explain so dramatic a change. Something must be making invocation of Ockham's razor more popular than it once was.

Perhaps, I thought, this seeming popularity can be traced to a relatively few individuals. It is true that some judges have used it more than others. It has been, for example, more popular in the federal courts than in state courts,²⁰ and among the American states, for some reason Wisconsin judges have been the most frequent users of Ockham's razor.²¹ Also, a few judges do appear to have adopted it as a favorite interest. Somewhat surprisingly in light of the razor's special suitability in cases where there is genuine doubt about the correct answer, Frank Easterbrook, a federal judge on the Seventh Circuit Court of Appeals, has found it consistently attractive.²² Repeated use by a few judges like Judge Easterbrook may have encouraged wider use among others.²³

17. The early figures are derived from a search of Hein-on-Line conducted 29 December 2004.

18. Moreover, every time an article that includes Ockham's razor in its title is cited, the number of citations increases even if its actual use is small. For example, Ellen Wertheimer, *Ockham's Scalpel: A Return to a Reasonableness Standard*, 43 VILL. L. REV. 321 (1998) had (as of 27 December 2004) been cited in one Pennsylvania case and nine law review articles.

19. It has been said that economists have a special fascination for Ockham's razor; see, e.g., Ian Ayers, *Never Confuse Efficiency with a Liver Complaint*, 1997 WIS. L. REV. 503, 510; Robert Heidt, *Industry Self-Regulation and the Useless Concept 'Group Boycott'*, 39 VAND. L. REV. 1507, 1567 (1986).

20. Fifty-three to twenty-two during the past twenty-one years (as of 21 December 2005) by Lexis search.

21. Eight of the twenty-two during the past twenty years (as of 21 December 2005) by Lexis search.

22. *CFTC v. Zelener*, 373 F.3d 861, 868 (7th Cir. 2004); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997); *United States v. Rutherford*, 54 F.3d 370, 379 (7th Cir. 1995) (concurring); *Guinan v. United States*, 6 F.3d 468, 476 (7th Cir. 1993) (concurring); *United States v. Baker*, 905 F.2d 1100, 1104 (7th Cir. 1990); *Bonded Fin. Servs. v. European Am. Bank*, 838 F.2d 890, 894 (7th Cir. 1988).

23. *Bonded Financial Services*, 838 F.2d 890, has been cited for its analysis of a point of bankruptcy law, together with its use of Ockham's razor in: *MBNA Am. v. Locke*, 223 F.3d 1064,

Judges with a penchant for recondite terminology and fanciful images have also made reference to Ockham's razor with a greater frequency than those who have taken a more prosaic approach in formulating their opinions. It is not unusual, for example, to find reference to Ockham's razor used in opinions that also make reference to Scylla and Charybdis or Pandora's Box.²⁴ Florid figures of speech and abstruse terminology seem commonly to have accompanied use of Ockham's razor,²⁵ this despite the seeming incongruity of such usage with Ockham's own preference for simplicity.

III. SOURCE OF CITATIONS

Does increased use of Ockham's razor indicate an increase in the breadth of interests and range of knowledge on the part of American judges? Does it evince a judicial interest in medieval philosophy? The first is possible, but the second is unlikely. Not always—but sometimes—judicial opinions give a source for Ockham's razor when citing it. The cases, however, contain not one example of citation to a work by William of Ockham himself. Only secondary works ever appear. This absence cannot wholly be explained by the difficulty of the works themselves or by their use of the Latin language. Translations of parts of Ockham's voluminous works are available.²⁶ But American judges have chosen not to look at them. More surprisingly, they have also chosen not to make use of any of the secondary literature on Ockham. Of this there is quite a bit, and it deals in part with the razor.²⁷ These scholarly works nonetheless make no appearance in the case

1073 (9th Cir. 2000); *In re Finley*, Krumble et al., 130 F.3d 52, 56 (2d Cir. 1997); *Poonja v. Charles Schwab & Co.*, 199 B.R. 410, 413 (1996); *First Sec. Mortgage Co v. Citizens Bank of Sapulpa*, 1993 WL 738460, at *4 (N.D. Okla. 1993).

24. *Hoseman v. Technical Materials, Inc.* 554 F. Supp. 659, 660, 666 (D.R.I. 1982); *Phoenix Newspapers, Inc. v. Keegan*, 35 P.2d 105, 114 (Ariz. Ct. App. 2001).

25. Judge Bruce Selya also seems to have had a particular fondness for experiments with the English language, as for instance in *Hoseman*, 554 F. Supp. at 666 (“[A]rguments of pretext etiolate under the microscope of sweet reason.”). One of his former law clerks, Adam Pachter, University of Chicago Law School Class of 1996, reacted enthusiastically to the experience, but added, “If you don't like metaphors, alliteration, Shakespeare quotations, elaborate wordplay and lengthy words, then this clerkship is not for you.” (on file with the University of Chicago Placement Office).

26. *E.g.*, THE DE SACRAMENTO ALTARIS OF WILLIAM OF OCKHAM 104-05 (T. Bruce Birch ed., 1930) (“[F]rustra fit per plura quod potest fieri per pauciora.” “[T]hat is needlessly accomplished through more which can be accomplished through fewer.”); *see also* WILLIAM OF OCKHAM, PHILOSOPHICAL WRITINGS (Philotheus Boehner ed., 1957); William Ockham, *Predestination, God's Foreknowledge, and Future Contingents* (M.M. Adams & Norman Kretzmann eds., 1969).

27. *E.g.*, 1 ADAMS, *supra* note 9, at 156-61.

reports. Instead, wherever a citation appears to Ockham's razor, it comes either from a work of reference about philosophy,²⁸ a dictionary or encyclopedia,²⁹ a general treatment of law and logic,³⁰ or a popular work of a miscellaneous kind.³¹ In the majority of cases, no specific citation at all appears. Judges simply invoke it. In other words, most American judges have assumed they know what it means. And wherever they have felt a need for buttressing their reference to the razor with a supporting citation, they have taken what general works of reference they had at hand.

IV. JUDICIAL ATTITUDES TOWARDS OCKHAM'S RAZOR

Most American judges who mention it have had good things to say about Ockham's razor. Whatever may be their attitudes towards other artifacts of the Middle Ages, they have warmed to the razor. They may have described the Rule in Shelley's Case as "a rule possessing no salutary purpose, surviving . . . only because of tradition and legislative inertia,"³² and they may have characterized an argument with which they disagree as "akin to medieval scholastic argumentation about how many hypothetical angels, or hypothetical minds, can sit on the head of a pin."³³ But they have not scoffed at Ockham's razor. To the contrary, they have described it as embodying "the most elegant approach" to legal problems.³⁴ They have praised it as embodying a principle of interpretation "as valid juridically as it is scientifically."³⁵ And they have applauded the utility of an approach that begins with the assumption that

28. *E.g.*, *Allen v. United States*, 588 F. Supp. 247, 441 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987) (citing BERTRAM RUSSELL, *HISTORY OF WESTERN PHILOSOPHY* (1972); *Clark v. Taylor*, 163 F.2d 940, 951 (citing KENNETH BURKE, *A GRAMMAR OF MOTIVES* (1945)).

29. *Casarez v. Val Verde County*, 16 F. Supp. 2d 727, 729 (W.D. Tex. 1998) (citing Wordsworth, but possibly E.C. Brewer, *DICTIONARY OF PHRASE AND FABLE* (1994)); *Kelley v. Am. Heyer-Schulte Corp.*, 957 F. Supp. 873, 882 (W.D. Tex. 1997) (citing *ENCYCLOPEDIA BRITANNICA* (11th ed. 1911)).

30. *Martin v. Campanero*, 156 F.2d 127, 130 (2d Cir. 1946) (citing W.W. BUCKLAND, *SOME REFLECTIONS ON JURISPRUDENCE* 97 (1945)); *Hart v. Sec'y of the HHS*, 60 Fed. Cl. 598 (citing *Principia Cybernetica*, available at <http://pespmc1.vub.ac.be>).

31. *Hermes Consol., Inc. v. United States*, 58 Fed. Cl. 3, 7 (2003) (citing MICHAEL SHERMER, *WHY PEOPLE BELIEVE WEIRD THINGS: PSEUDOSCIENCE, SUPERSTITION AND OTHER CONFUSIONS OF OUR TIME* (1998)). No reference to Ockham's razor appears in Shermer's book, but it does contain a forceful argument for skepticism generally. Judge Lawrence J. Block must have admired the book, because he cited Shermer's work as a source for Ockham's razor again in *L.W. Matteson, Inc. v. United States*, 61 Fed. Cl. 296, 310 (2004).

32. *In re Estate of Hendrickson*, 736 A.2d 540, 544 (N.J. Super. Ct. 1999).

33. *House v. Bell*, 311 F.3d 767, 779 (6th Cir. 2002).

34. *Eli Lilly & Co. v. Zenith Goldline Pharms., Inc.*, 2001 U.S. Dist. LEXIS 18361, at *32 (S.D. Ind. 2001).

35. *Swann v. Olivier*, 28 Cal. Rptr. 2d 23, 25 (Ct. App. 1994).

“all things being equal, the simpler explanation is probably true.”³⁶ When its medieval origin is mentioned at all by its modern judicial users, its antiquity has been regarded as making it “venerable but valid” or “age-old”.³⁷ No stigma has attached because of its age.

V. THE SEVERAL USES OF OCKHAM’S RAZOR

Have the judges wielded the razor in ways that are faithful to Ockham’s insights, or at least to the generally accepted understanding of the razor’s utility? Or have they misused it instead? Of course, one cannot expect them to have dealt with the complexities and the limitations in the ways Ockham himself approached the subject. He admitted that God himself had sometimes acted in ways to which the razor could not aptly be applied. Even human behavior had its complexities. But such an excursion into Ockham’s thought would surely be quite out of place in a judicial opinion. The question of fidelity to Ockham’s purpose nonetheless remains. Answering it requires examining the ways in which American judges have employed the razor. I found four principal ways in which the metaphor was used. The four do not quite cover all the uses discovered, and there is “overlap” between them; they all promote the virtues of simplicity, although in somewhat different ways. In a few cases, it may be said, a judge has invoked the razor primarily as a means of self-congratulation, as in “I use Ockham’s razor to cut at once to the heart of the issue in this case.”³⁸ But these instances are exceptional; the more common fall readily into one of four categories.

A. *Statutory Interpretation*

Ockham’s razor has served as a tool in the construction of statutes, normally as a way of buttressing the embattled “plain-meaning” approach to the task.³⁹ As Judge Wisdom put it in a 1966 opinion, “Occam’s razor slices through the arguments based on legislative history

36. *L.W. Matteson, Inc. v. United States*, 61 Fed. Cl. 296, 310 (2004).

37. *Drake v. State*, 287 S.E.2d 180, 185 (Ga. 1982); *Jeffries v. Sec’y of the HHS*, 2004 U.S. Claims LEXIS 273, at *80.

38. *E.g.*, *State v. Griffin*, 691 A.2d 556, 558 (R.I. 1997) (“Wielding Ockham’s razor, we cut directly to the heart of this appeal.”); *Wis. Bell v. Pub. Serv. Comm’n*, 670 N.W.2d 97, 102 (Wis. Ct. App. 2003) (“Applying Occam’s razor, we focus on the heart of the dispute and cut away the technical-specifications arcana.”).

39. For surveys and opposing views, see., e.g., William Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

and congressional intent.”⁴⁰ It provides a simple answer based on an ordinary understanding of language found in a statute. For instance, the federal Wilderness Act empowered the Forest Service to regulate use of lakes bordering lands owned by the federal government, including some in the Upper Peninsula of Northern Michigan. The statute authorizing this regulation, however, contained a savings clause for established rights of the owners of private lands in the forests; the Forest Service’s powers were made “subject to existing private rights.”⁴¹ When the Service banned the operation of motor boats on Crooked Lake, the owners of a fishing resort on the Lake, who had offered use of motor boats to their customers, objected to the new rule. They claimed their usage was an “existing private right” within the meaning of the statute, so that they were entitled to continue doing what they had long done. The dispute went finally to a federal court of appeals. The question at issue was whether their interest amounted to such an existing right. The majority of judges of the Sixth Circuit held that it did not.⁴² Citing a 375-page issue of a law review devoted in its entirety “to trying to untangle the phrase,”⁴³ the Court’s majority upheld the regulation under a “careful reading” of the statute. They refused to “ossify” current uses against further governmental regulation.

However, Danny Boggs, joined by three of his judicial colleagues, invoked Ockham’s razor in dissent. To him, the actual words of the statute seemed to mean next to nothing once the sophisticated interpreters in the majority had finished with them. As he put it, “Application of an Occam’s razor-like principle to interpretation” of the statute in question showed how wrong-headed and illogical the majority’s view was.⁴⁴ The majority seem to allow “existing rights” to extend no further than the right to take a drink of water from the Lake. In Boggs’ view, Ockham’s razor should have been used to pare away the allegedly convoluted interpretations of the statute upon which the majority’s view depended. He lost, but for present purposes this does not matter. His dissent is a good example of one of the consistent judicial uses of Ockham’s razor. It has been invoked to reject “deft” readings of statutes.

40. Ala.-Tenn. Natural Gas. Co. v. Fed. Power Comm’n, 359 F.2d 318, 335 (5th Cir. 1966).

41. 16 U.S.C. § 1133(c).

42. Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996).

43. *Symposium on Valid Existing Rights*, 5 J. MIN. L. & POL’Y 381 (1989-90).

44. 89 F.3d at 1292.

It has been used instead in “electing the simpler of . . . competing interpretations over the more subtle.”⁴⁵

B. Ockham’s Razor as a Scalpel

Just as often Ockham’s razor has been wielded as something like a surgical knife. It cuts away what is diseased. Judicial opinions have invoked it as a way of disposing of an argument with which their authors disagree or of dismissing a concern they do not share. They “slice off” one of the party’s arguments, and it goes away. Judge Frank so dealt with a difficult question about the potential reach of *res judicata* raised in an early “class action” case. It was a good case for using Ockham’s razor, he said, so that he and his fellow judges could “avoid squandering our energies” by dealing with the possible consequences of application of the doctrine of *res judicata* to the judgment.⁴⁶ He applied the razor to dispose of the issue.

Was this intellectual laziness or prudent judicial restraint? It is hard to be sure. But invocation of Ockham’s razor undoubtedly made it easier for him to reach the result he wanted. And it has been so used with some regularity in cases where an unsatisfactory argument appears in a lower court opinion. The appellate court uses Ockham’s razor to dismiss the argument, even if it lets the substantive decision stand on a professedly simpler ground.

Current judicial opinions produce numerous examples of use of the razor to reject reasoning a judge regards as irrelevant, erroneous, or inconsequential. Does a criminal offense require a criminal intention on the part of the actor? No, consistently answers a judge who has an instinctive dislike of subjective tests, at least wherever prior law does not require a contrary result. The *actus reus* is enough. “Let us take Occam’s razor and slice off the unnecessary construct.”⁴⁷ “Best to take Occam’s Razor and slice off needless complexity.”⁴⁸ “I would take Occam’s Razor and slice off the wasted motion.”⁴⁹ This amounts to a preference for simplicity on the part of the judge, no doubt. Ockham’s razor serves to “slice off” irrelevant or awkward questions. It simplifies his task. It

45. *Stockbridge Sch. Dist. v. Dep’t of Pub. Instruction*, 531 N.W.2d 624, 627 (Wis. Ct. App. 1995); *see also* *Hermes Consol., Inc. v. United States*, 58 Fed. Cl. 3, 7 (2003); *De Jesus v. United States*, 268 B.R. 185, 195 (2001). It has also been used for the reverse: to reject a “plain meaning” approach to statutes; e.g., *United States v. Md. Cas. Co.*, 573 F.2d 245, 251 (5th Cir. 1978) (dissent).

46. *McComb v. Frank Scarbo & Sons*, 177 F.2d 137, 141 (2d Cir. 1949).

47. *United States v. Rutherford*, 54 F.3d 370, 379 (7th Cir. 1995) (concurrency).

48. *CFTC v. Zelener*, 373 F.3d 861, 868 (7th Cir. 2004).

49. *Guinan v. United States*, 6 F.3d 468, 476 (7th Cir. 1993) (concurrency).

ends an argument. The judge can instead rely instead upon the legal argument he believes should determine a case's outcome.⁵⁰

Whether this approach is consistent with judicial responsibilities is a harder question, and it has occasionally elicited mild protests by other judges.⁵¹ They are unimpressed by the argument that anything but aggressive use of Ockham's razor "would leave people adrift."⁵² Indeed its invocation in order to avoid dealing with a legal argument may be what leaves the litigants adrift. Litigants (and their lawyers) find that an issue has been "sliced away" rather than addressed. They have a point. Use of Ockham's razor leaves legal arguments unanswered. The virtues of simplicity may be outweighed by the other factors.⁵³ It may be, of course, that wielding Ockham's razor to avoid dealing with an awkward or irrelevant legal issue is merely harmless hubris on the part of our judges. All the same, it is hard to deny that scalpel-like usage of the razor can become a cover for intellectual laziness.

C. *Choice Among Legal Rules*

We know that judges sometimes have to pick one legal doctrine instead of another. Statutes may be unclear; precedents can be uncertain; standards are sometimes question-begging. That leaves them little choice. In these circumstances, Ockham's razor offers them a tool. It becomes a reason for selecting one legal rule rather than another, or at least for justifying a choice once made, by invoking the principle of parsimony to reject the complexity of other possible rules. So we find William Brennan of the United States Supreme Court, professedly tired of grappling with a second half of a two part test used to determine a party's right to jury trial under the Seventh Amendment, concluding, "The time has come to borrow William of Occam's razor and sever this portion of our analysis."⁵⁴ Three decades of experience at the Supreme Court had brought him to the realization that the "scholasticist debate" required to decide whether a remedy was legal or equitable in nature was

50. See, e.g., *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (per Breyer, J. dealing with the Sherman Act).

51. E.g., *United States v. McKinney*, 919 F.2d 405, 426 (7th Cir. 1990) ("Occam's razor to the contrary notwithstanding . . .").

52. *CFTC*, 373 F.3d at 868.

53. Other examples: *United States v. Baker*, 905 F.2d 1100, 1104 (7th Cir. 1990); *Casarez v. Val Verde County*, 16 F. Supp. 2d 727, 729 (W.D. Tex. 1998); *In re Faith B.*, 812 N.E.2d 640, 648 (Ill. Ct. App. 2004).

54. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 575 (1989) (dissent). Without apparent self-consciousness, Justice Brennan's dissent coupled invocation of the razor with a conclusion that there was "little purpose to our rattling through dusty attics of ancient writs."

“impracticable and unilluminating.”⁵⁵ Better to stick with a simpler test. Ockham’s razor seemed an ideal means for getting rid of needless confusion.⁵⁶

Some judges in our lower courts have also preferred simpler tests. “The simplest of competing theories [is] to be preferred to the more complex and subtle,” reasoned a New York judge who specifically invoked Ockham’s razor to support his preference for one legal rule over another.⁵⁷ A California judge rejected “complex and subtle” distinctions between trespassers, invitees and other kinds of persons making use of the property of others, preferring instead to use “the principle of Occam’s razor” and take “the simplest of competing theories” as the rule of decision in a case of injury to a surfer on the beach adjoining a defendant’s land.⁵⁸ An Alaska judge similarly employed Ockham’s razor to strip away statutory language describing a penalty to be awarded to any child caught drinking as “probation,” allowing him to arrive at “the unadorned truth”—that the consequences were sufficiently severe to call for a right to jury trial and the presence of a defense lawyer.⁵⁹

This preference for simple rules has not been, it should be said, a universal proclivity among judges. Some, even those who mention Ockham’s razor with approbation, have not applied it in circumstances where they might have.⁶⁰ It is not hard to see why. Simple rules are more attractive than complex rules, no doubt, but they do not always fit the realities of daily life. The “totality of the circumstances” may demand

55. *Id.* at 578.

56. *See* Commissioner v. Engle, 464 U.S. 206, 230 (1983) (Blackman J. dissenting and complaining “Ockham’s razor is nowhere in evidence” in the majority’s formulation of statutory test); Bonded Fin. Servs. v. European Am. Bank, 838 F.2d 890, 894 (7th Cir. 1998) (“We slice these off with Occam’s razor and leave a more functional rule.”); Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712 (7th Cir. 1997) (“[I]t is best to take Occam’s Razor and slice off unnecessary steps and proceed directly to the question.”). For an example from the law reviews, see T.P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 515 (2003) (“The law of future interests desperately needs Ockham’s Razor.”).

57. *Matter of Swierupski v. Korn*, 419 N.Y.S.2d 87, 91 (App. Div. 1979).

58. *Swann v. Olivier*, 28 Cal. Rptr. 2d 23, 25 (Ct. App. 1994); *see also* MBNA Am. v. Locke, 223 F.3d 1064, 1073 (9th Cir. 2000) (using Ockham’s razor “renders this messy dispute irrelevant”); *Adirondack League Club v. Sierra Club*, 706 N.E.2d 1192, 1199 (N.Y. 1998) (dissent) (argument in favor of simple test for navigability making use of Ockham’s razor); *Mallet v. Pickens*, 522 S.E.2d 436, 443 (W. Va. 1999) (invocation of Ockham’s razor to abolish distinction between licensees and invitees in favor of “a simpler and more predictable rule”).

59. *State v. Auliye*, 57 P.3d 711, 717 (Alaska Ct. App. 2002).

60. *E.g.*, *Schneer v. Commissioner*, 97 T.C. 643, 663 (1992) (“I generally try to apply Occam’s razor to the solution of legal problems as well as logic problems” said by a judge who used it in a case “beset with the obstacles and pitfalls of the assignment of income doctrine.”).

more complex analysis on the part of judges.⁶¹ In such circumstances, cutting away the complexities with Ockham's razor would be a mistake.

D. *The Law of Evidence*

Probably most nearly akin to the use of Ockham's razor in medicine are cases where a judge has considered it in analyzing the proof presented by each party. Does such use fit within our law of evidence? Or is it a source of confusion? The question has arisen in two contexts—one actually involving medicine itself, where a doctor has invoked (or refused to invoke) Ockham's razor, usually as an expert witness; the other not involving medicine, where a judge has used it to evaluate the evidence presented to him. Both of these citations of the razor have been challenged upon appeal.

Most cases involving the first situation have approved use of the razor as a diagnostic tool. For example, in a 2002 case where the correct diagnosis of what ailed a difficult child was at issue, a federal judge accepted the one proffered by the witnesses for the defendants. It explained "all observable symptoms in the classroom" and "conform[ed] with the age-old principle of science and logic, Ockham's Razor."⁶² Similarly the opinion of another federal judge rejected a doctor's explanation for the existence of Sjorgren's Syndrome in patients he had examined, because it "fail[ed] the test of parsimony," adding an explanatory footnote to Ockham's razor.⁶³ The cases in point are neither thick nor unanimous. Claims based on an explanation that invoked Ockham's razor have sometimes been dismissed as "Not only simple, but simplistic"⁶⁴ or as "pure hindsight."⁶⁵ But more have found testimony by doctors admissible and even praiseworthy because it was based on a preference for simple explanations.

It is otherwise where judges themselves have based their own evaluation of the evidence on principles derived from Ockham's razor in the law of proof. They have sometimes invoked it in reaching common-

61. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. OF CHI. L. REV. 1175, 1187-88 (1989) (using the example of *Pokora v. Wabash Railway Co.*, 292 U.S. 98 (1934), in which the United States Supreme Court rejected application of a simple rule of liability, one that had been formulated by Justice Holmes). The situation is not unique to the law; see, e.g., Albert O. Hirschman, *Against Parsimony: Three Easy Ways of Complicating Some Categories of Economic Discourse*, 74:2 AM. ECON. REV. 89 (1984).

62. *J.S. v. Shoreline Sch. Dist.*, 220 F. Supp. 2d 1175, 1186 (W.D. Wash. 2002).

63. *Kelley v. Am. Heyer-Schulte Corp.*, 957 F. Supp. 873, 882 (W.D. Tex. 1997); see also *Kramer v. United States*, 579 F. Supp. 314, 318 (D. Md. 1984).

64. *Jeffries v. Sec'y of the HHS*, 2004 U.S. Claims LEXIS 273, at *80.

65. *Eli Lilly & Co. v. Zenith Goldline Pharms., Inc.*, 2001 U.S. Dist. LEXIS 18361, at *32 (S.D. Ind.).

sense conclusions from facts found on the records.⁶⁶ But in a more formal sense required by the law of evidence, the weight of authority is against allowing judges to rely upon Ockham's razor. A testing case arose recently in Shael Herman's home state of Louisiana. The plaintiff had contracted to repair a floating roof on a crude oil storage tank owned by the defendant. During the course of repairs, the tank exploded, killing three of the plaintiff's employees. The question was whether the defendant was at fault for the accident. It was hard to say. No one knew for certain what had caused the explosion. The trial judge noted that the possible explanations "range[d] from the very simple to indeed the hyper-complex."⁶⁷ He chose the explanation that seemed the simplest to him—that the workers themselves had caused the explosion. In reaching this conclusion he stated, "I have used Occam's razor which is as valid juridically as it is scientifically."⁶⁸ On appeal, this was attacked as "an erroneous and incorrect view of the law and an abuse of discretion" on the part of the judge.⁶⁹

There was much to be said in favor of the appellant's argument. Our law of evidence depends on allocation of the burden of proof. The party who bears the burden must produce evidence to satisfy it, or his case is lost. To allow Ockham's razor to stand as a substitute for proof subverts that principle. It would permit a verdict or judicial finding in one party's favor based simply on that party's offering the simplest explanation for a chain of events.⁷⁰ Faced with this objection in the Louisiana case, the judges of the Fifth Circuit vacillated. Their opinion expressed unease about the razor's explicit use: it "may be unfortunate for its potential to create post-judgment controversy."⁷¹ But it affirmed the decision nonetheless, supposing rather weakly that the trial judge "did not abdicate his duty as a fact-finder." As a later opinion would characterize the appellate court's opinion, its limited approval of Ockham's razor was not meant "to establish a new standard of proof for

66. See, e.g., *Thompson v. Bell*, 373 F.3d 688, 690 (6th Cir. 2004) ("Applying the principle of Occam's razor, we conclude that more than likely, a genuine mistake was made."); *United States v. Navarro-Camacho*, 186 F.3d 701, 708 (6th Cir. 1998) ("Occam's Razor also supports the magistrate judge's decision. The conspiratorial theory offered by [the defendant] simply does not make much sense."); *Brown v. Vance*, 637 F.2d 272, 281 (5th Cir. 1981) ("Using Occam's Razor, the simple and obvious explanation for this disparity is . . .").

67. *Justiss Oil Co. v. Kerr-McGee Refining Corp.*, 75 F.3d 1057, 1061 (5th Cir. 1996).

68. *Id.*

69. *Id.* at 1060.

70. See, e.g., Brian W. McKay, *Mixed Motives Mix-Up: The Ninth Circuit Evades the Direct Evidence Requirement in Disparate Treatment Cases*, 38 *TULSA L. REV.* 503, 527 n.251 (2003).

71. 75 F.3d at 1061.

the plaintiff to surmount, but rather as a device to be used after a careful and proper weighing of the evidence.”⁷² This is as positive a characterization of Ockham’s razor’s utility in the law of evidence as I have been able to find in the cases. Most have rejected its possible use as any part of the law of evidence.⁷³ In the single circumstance where Ockham’s razor would fit most naturally into our law, therefore, our courts have refused to apply it.

VI. CONCLUSION

Despite this refusal, the judges of the Fifth Circuit did say that Ockham’s razor could be used after “a careful and proper weighing of the evidence.” I read this and asked: Used for what? The judges’ own answer to that question is admittedly unsatisfactory. In fact, they gave none. If one looks at the other cases, however, an answer of sorts does emerge. Ockham’s razor has served several purposes. All of them are bound together, however, by a desire for simplicity—simplicity in statutory construction, simplicity in formulation of workable legal rules, and simplicity in arriving at reasonable explanations of ambiguous events. If any theme links the various uses modern American judges have found for Ockham’s razor were recently summed up by one federal district judge. He said: “The correct answer is the simplest one.”⁷⁴ In a legal world filled with complexity, it has been both a battle cry and a *cri de cœur*.

72. Kelley v. Am. Heyer-Schulte Corp., 957 F. Supp. 873, 882 (W.D. Tex. 1997).

73. Hart v. Sec’y of the HHS, 60 Fed. Cl. 598 (2004) (subjecting finding based upon statistics to “a razor of a different sort”); Jordan v. Sec’y of the HHS, 1992 U.S. Ct. Cl. LEXIS 474, at *23 (apparent rejection of razor’s use in claim based on Childhood Vaccination Injury Act of 1974); State v. Tykwinski, 2000 Minn. App. LEXIS 802, at *11 (treating counsel’s invocation of Ockham’s razor in closing argument as error, although harmless error); Kaplan v. Kaplan, 463 A.2d 223, 225 (Vt. 1983) (refusing to “attack the order with Occam’s razor” even though it appeared that a child support award included disguised alimony payment).

74. United States v. Kelly, 267 F. Supp. 2d 5, 10 (D.D.C. 2003).