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## FOREWORD: DOES EVIDENCE LAW MATTER?

*David P. Leonard\**

*Victor J. Gold\*\**

The essay form is the fit instrument for a thinker whose chief concern is to lay bare the contending claims that seek the mediation and authority of society through law, and to give some indication, at least, of how these processes of mediation in fact operate. For the essay is tentative, reflective, suggestive, contradictory and incomplete. It mirrors the perversities and complexities of life.<sup>1</sup>

Whether evidence law “matters” is a subject capable of as many interpretations as there are evidence scholars. There is, in other words, no single way to approach this question. Because the authors of the essays that follow devote much of their professional lives to the study of evidence law, it may be assumed that they believe the subject “matters” a great deal. Yet we suspect that all who deal with evidence law sometimes ask themselves whether it ever serves the law’s overriding values. Our thoughts on these subjects are often tentative and speculative; to reach their full flower, they could benefit from exposure and critical commentary. The essay format provides the ideal vehicle for exposing such thoughts.

We asked a group of distinguished scholars from around the country to respond to the general question, “Does evidence law matter?” purposely providing little specific guidance. What we received is a series of essays each of which approaches the question from a different perspective. While it is possible to categorize the essays in many different ways, they may be grouped according to four general themes.

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1. FELIX FRANKFURTER, *FELIX FRANKFURTER ON THE SUPREME COURT: EXTRA-JUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION* 203 (Phillip H. Kurland ed. 1970), reprinted in Felix Frankfurter, *Book Review* 77 U. PA. L. REV. 436, 437 (1929) (reviewing BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928)).

## I. THE CONNECTIONS BETWEEN EVIDENCE RULES, SOCIAL VALUES AND POLITICAL REALITIES

The first group of essays explores the goals and limitations of the trial process and the adversary system. Professor Stephan Landsman takes an historical approach to the general question in *Who Needs Evidence Rules, Anyway?*. Using proceedings such as the trial of Sacco and Vanzetti and the confirmation hearings on the nomination of Clarence Thomas as illustrations, Professor Landsman answers the question "Does evidence law matter?" with a strong "yes." He concludes that evidence law is essential to the administration of justice in an adversarial system. In *Does It Matter Who Is in Charge of Evidence Law?*, Professor Eleanor Swift describes how California voters used the initiative process to make fundamental changes in rules relating to character evidence and hearsay. She analyzes the values served by the traditional rules and argues that the processes of adjudication and legislation are better suited to reforming evidence law than is the initiative process.

Three essays in this group specifically address the effect of evidence on the fact finder. In *Making the Law of Factual Determinations Matter More*, Professor Randolph Jonakait argues that accurate fact determination is crucial to the enforcement of the substantive law and suggests that in order to improve both the quantity and quality of information received by the fact finder, scholars should pay greater attention to the entire field of fact determination and to studies of the non-evidentiary forces that affect jurors' information processing. Only by looking beyond the evidence rules themselves, he argues, can we improve the accuracy of fact determination. Professor Paul Bergman points out that it isn't just what juries hear but also what they do not hear that can affect their verdicts. In *Admonishing Jurors to Disregard What They Haven't Heard*, Professor Bergman points out that the difficulties judges face in controlling jurors' inferential processes are magnified when, because of human nature and their unfamiliarity with evidence rules, jurors draw inferences from the *failure* of a party to offer certain evidence. Professor Bergman explores what, if anything, a judge should tell the jury when a party's failure to offer evidence stems from evidence rules prohibiting that evidence. And in his essay "*The Whole Truth?*": *How Rules of Evidence Make Lawyers Deceitful*, Professor Bruce Green observes that evidence law sometimes promotes the appearance of deceit because it eliminates from consideration evidence jurors anticipate receiving. He also notes that evidence law sometimes promotes actual deceit by legitimizing prevailing methods of witness preparation. He suggests that educating jurors about the purposes of evidence law and the realities of the adversary process can go a

long way toward eliminating the appearance of deceit and controlling its effects.

Two essays draw examples from the popular culture to make points about the rules of evidence. In *Rape, Lies and Videotape*, Professor Robert García uses a scene from *Last Tango in Paris* to examine both the meaning of rape and the multi-faceted difficulties of “proving” at trial whether rape occurred. He describes the problematic nature of definitions and of our construction of reality, and shows how minor differences in these factors, or in the way particular witnesses, jurors or lawyers perceive them, can affect the outcome of a trial. In *Thelma and Louise and the Law: Do the Rape Shield Rules Matter?*, Professor Ann Althouse asks whether rape shield laws have decreased the abuses of a system that further victimizes the rape victim, or whether they are merely a part of an entire system that pervasively oppresses women. In the film *Thelma and Louise*, a woman shoots her companion’s rapist and expresses the belief that calling the police would be useless because they would never believe her companion’s claim of rape. Professor Althouse explores why the character feels a need to take the law into her own hands and then to flee, but she expresses some optimism that the rape shield laws will eventually have some positive effects on the system.

The final three essays in this group also draw connections between evidence rules and social values. In *What’s the Matter With Evidence?*, Professor Kenneth Graham, Jr. decries the unwillingness of evidence teachers to teach the rules of evidence, the general disdain for such rules among legal academics, and the tendency of evidence scholars to write about abstract concepts rather than to read the cases and to attend to the realities of the courtroom. He challenges us to examine more carefully why we maintain certain rules and to focus our reform efforts on the rules themselves. Professor Mark Cammack’s essay *Evidence Rules and the Ritual Functions of Trials: “Saying Something of Something,”* suggests that we consider the trial as a ritual that symbolically expresses and validates abstract ideas about social reality. He also shows how the evidence rules themselves reflect the “radical dissociation” of law and fact in our society. Finally in *Rules of Evidence and Substantive Policy*, Professor David Leonard asks whether rules of evidence are subservient to substantive legal rules, or whether by design or application they establish, limit or further substantive rights. Using several evidence rules as examples, he concludes that many rules do have substantive impact and suggests that such impact should be considered as we attempt to reform the law of evidence.

## II. HISTORICAL AND ANALYTICAL APPROACHES TO THE CONCEPTUALIZATION AND REFORM OF EVIDENCE LAW

Other essays offer more general thoughts about how our evidence system is constructed and how the system might be explored in the literature. In *Meta-Evidence: Do We Need It?*, Professor Christopher Mueller points out that evidence rules, like procedural rules, are often called upon to work in cases quite different from those their drafters envisioned. Professor Mueller offers some thoughts about the extent to which evidentiary reform and science—particularly statistics—can assist the courts in toxic tort trials and child abuse prosecutions.

The next several essays look to history. In *Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement*, Professor Laird Kirkpatrick notes that the writings of the great evidence scholars of the last two centuries, especially those of Jeremy Bentham, repudiated much established doctrine. He points out that while scholars long have called for reform and, in many cases, the elimination of exclusionary rules, modern practice realities finally have moved in that direction. In particular, he notes that the Alternative Dispute Resolution (ADR) movement rejects traditional evidence law. However, Professor Kirkpatrick demonstrates that basic principles underlying evidence law continue to have force even in the ADR context where they tend to affect the *weight*, if not the admissibility, of evidence. Professor Michael Ariens also draws from history. In *The Law of Evidence and the Idea of Progress*, Professor Ariens reviews the various schools of thought that have dominated modern evidence law. He criticizes the notion that evidence scholarship should focus on the progressive ideal of law reform and suggests that we conceptualize evidence law in a new way.

Two other essays draw on the intellectual history of evidence scholarship to point out opportunity for clarification and reform of evidence law. In *The Myth of Conditional Relevancy*, Professor Ronald Allen builds upon an earlier work by Professor Vaughn Ball. That work challenged the validity of the traditional concept of conditional relevancy. Professor Allen extends this work, and suggests an amendment to the Federal Rules of Evidence that would embody a simpler, more coherent formula. Professor Richard Friedman looks at evidence treatises in *Evidentiary Rules and Rulings: The Role of Treatises*. He notes that evidence codifications and common law rules are frequently general, providing no clear answers to many issues. As a result, the impact of this law is reduced. He argues that an evidence law treatise can narrow if not fill the gap between the general statement of law and its specific applications.

### III. HOW COURTS TREAT THE EVIDENCE RULES

Several essays discuss the ways the courts tend to treat particular evidence rules. Professor Margaret Berger takes a broad view of the issue in *When, if Ever, Does Evidentiary Error Constitute Reversible Error?*. She examines the reported federal appellate cases from 1990 to determine how often courts reversed for evidentiary error and finds that while the courts found error in many cases, they rarely found the error to be reversible and usually gave short shrift to evidentiary questions. Professor Berger suggests that appellate courts might be sending a signal that evidence rules do not much matter, and she expresses concern for that possibility. Professor Victor Gold also takes a broad view in *Do the Federal Rules of Evidence Matter?*. The Federal Rules of Evidence were intended to reform and simplify federal evidence rules. Professor Gold focuses primary attention on rules governing witness competency and impeachment, and examines whether they have achieved their goals. He shows that courts have often twisted or ignored the Federal Rules, continued to apply old law, created new law, and found discretion to admit evidence where the rules were intended to limit that discretion. He then discusses some sources of these problems and suggests ways to resolve them.

Two other essays look at specific evidentiary rules, both relating to hearsay. In *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, Professor Myrna Raeder criticizes the use of the so-called "catchall" exceptions in the Federal Rules of Evidence. She observes that these exceptions have created a discretionary aspect to hearsay law which undermines certainty and increases arbitrariness. She offers alternative formulations of the catchall exceptions to resolve these problems. Judge Arthur Alarcon's essay *Suspect Evidence: Admissibility of Co-Conspirator Statements and Uncorroborated Accomplice Testimony*, examines whether the statement of an alleged co-conspirator or accomplice, standing alone, can be sufficient evidence to convict an accused. Judge Alarcon concludes that because of the dangers posed by such evidence, trial judges should use their powers under the evidence rules to exclude the testimony of alleged crime partners when its probative value is outweighed by its prejudicial effect. Judge Alarcon argues that trial courts have the responsibility to exercise their powers in this way in order to accomplish the truth-seeking function of the trial.

#### IV. THE NEED FOR MORE FORMAL EVIDENTIARY RULES IN PRETRIAL AND OTHER NON-TRIAL PROCEEDINGS

The final essays explore several settings in which formal evidence rules are not typically used, and discuss the wisdom of maintaining procedures less bound by evidence rules. In *The Pretrial Importance and Adaptation of the "Trial" Evidence Rules*, Professor Edward Imwinkelried suggests that evidence law matters most at the pretrial stages of litigation, such as hearings on motions in limine and summary judgment. Accordingly, he suggests that certain aspects of evidence law should be adapted to this reality. In *Does Evidence Law Matter in Criminal Suppression Hearings?*, Professor Elizabeth Marsh explores whether rules of evidence are, and should be, applicable to pretrial suppression hearings in criminal cases. She notes that the proper answer to the question depends on a consideration of the particular evidentiary rule involved and the purposes of suppression hearings and argues that although the rules should play a role in the hearings, their importance is overshadowed by the constitutional purposes of the hearings and the issues at stake. Finally, in *Evolution in Child Abuse Litigation: The Theoretical Void Where Evidentiary and Procedural Worlds Collide*, Professor William Patton suggests that where a single event or problem, such as child abuse, gives rise to multiple cases, evidentiary rulings in one case can have significant impact on the other related litigation. Notwithstanding this impact, he notes, current evidence doctrine provides no basis for considering the prejudicial impact of these rules upon the related litigation.

This Symposium will leave the reader with no simple answer to the question "Does evidence law matter?" Yet, the essays vividly show the breadth and complexity of issues presented by modern evidence law. What emerges from this Symposium, therefore, is a reaffirmation of a principle so basic to legal scholarship that it is often forgotten: the pursuit of answers is worthwhile even if those answers can never be found.