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WHO NEEDS EVIDENCE RULES, ANYWAY?

*Stephan Landsman**

I. EVIDENCE RULES AND ADVERSARIAL EXCESS

Americans seem wedded to an adversarial way of doing business. Competition and contest are deeply ingrained in our culture. Not surprisingly, ours are among the most adversarial courts in the world. This continues to be true despite almost 100 years of anti-adversarial agitation by reformers like Roscoe Pound,¹ Jerome Frank,² Warren Burger³ and Marvin Frankel,⁴ all of whom have decried our "sporting theory of justice"⁵ and our contentious courtroom pyrotechnics. We remain committed to a process that leaves it to the parties to decide, in light of their adversarial advantage, what proofs to adduce and what challenges to make to proofs offered by opponents.

One assumption our court system makes is that reliance on an adversarial approach to the gathering and presentation of testimony necessitates evidentiary restraints in order to avoid nasty, brutish and ultimately unfair contests. Events of the last few months provide some powerful evidence that this assumption has merit and that the absence of rules of evidence is likely to result in an unsatisfactory free-for-all. Perhaps the clearest example of what an adversarial inquiry looks like when no evidentiary rules apply is the United States Senate's recently concluded hearing concerning the sexual harassment allegations made by Professor Anita Hill against Supreme Court nominee⁶ Clarence Thomas.

In the Hill/Thomas case partisan politicians turned a legislative hearing into an adversarial contest to determine the fitness of Judge Thomas to sit on the Supreme Court. In their zeal to win, each side used

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1. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), reprinted in 35 F.R.D. 273 (1964).

2. See JEROME FRANK, *COURTS ON TRIAL* (1949).

3. See Warren Berger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976) in 70 F.R.D. 79, 83-96 (1976).

4. See MARVIN FRANKEL, *PARTISAN JUSTICE* (1980).

5. See Pound, *supra* note 1, 35 F.R.D. at 281.

6. Clarence Thomas was eventually confirmed by a 52-48 vote of the United States Senate on October 15, 1991.

whatever came to hand. The result was the most scabrous public hearing in recent memory.

Troubling hearsay evidence was dragged in at almost every turn in the proceedings. Early in the interrogation of Anita Hill, Senator Arlen Specter quoted from and made extensive reference to the affidavit of a man named John Doggett III, who claimed that Professor Hill was prone to fantasize about romantic involvements with prominent male acquaintances.⁷ Doggett's words were used without the benefit of his live testimony or any immediate opportunity for cross-examination.⁸ Adopting a similar tactic, Senator Alan Simpson made veiled references to letters he said he had received detailing Professor Hill's unsavory sexual proclivities.⁹ The letter writers were never even identified, let alone produced for interrogation.¹⁰ Hearsay was again the order of the day when Senator Orrin Hatch sought, without the help of witnesses, to incorporate the theories of Juan Williams into the proceedings. Williams, a columnist for the Washington Post, had written an article concerning the allegedly improper conduct of certain Democratic senatorial staff members in conducting their investigations regarding Judge Thomas.¹¹ What was most distressing about all these incidents, and a number of others as well, was that the pitfalls attendant to the use of hearsay were ignored in the head-long rush to produce material to serve partisan objectives.

Unsupported or otherwise dubious opinions were also produced in great abundance at the hearing. Anita Hill began the parade of such claims by asserting with little apparent support that it was sexual harassment that led to her hospitalization for gastrointestinal problems in February of 1983.¹² Both Clarence Thomas and a sympathetic senator advanced the uncorroborated claim that sexual harassers operating in the workplace generally carry out extended campaigns of offensive conduct involving a series of victims rather than engaging in isolated acts of harassment.¹³ Finally, a character witness for Judge Thomas, J.C. Alvarez,

7. Richard L. Berke, *Court Nominee Rejects Charges Against Him Before Committee*, N.Y. TIMES, Oct. 12, 1991, at A9.

8. It should be noted that Doggett did eventually testify before the committee.

9. Berke, *supra* note 7, at A10.

10. Senator Simpson's performance recalls the behavior of Senator Joseph McCarthy in February of 1950, when he charged that there were a substantial number of communists in the State Department. "When senators repeatedly challenged him for specifics, McCarthy relied on innuendo, vague associations, and long-disproven allegations. . . ." STANLEY KUTLER, *THE AMERICAN INQUISITION* 190 (1982).

11. *Excerpts From Senate Hearings on the Thomas Nomination*, N.Y. TIMES, Oct. 13, 1991, at A11-12 [hereinafter *Excerpts*].

12. Berke, *supra* note 7, at A9.

13. *Excerpts, supra* note 11, at A11.

propounded the opinion, based apparently on her experience as a victim of harassment, that Anita Hill's behavior was inconsistent with the conduct of a true target of sexual harassment.¹⁴ All these opinions cried out for substantiation, though none was provided in any of the cases.

Character evidence of the most doubtful sort was bandied about throughout the proceedings. Both Judge Thomas and one of his witnesses were permitted to opine that Anita Hill was not the "meek, innocent, shy Baptist girl from the South" she depicted herself as being.¹⁵ Another witness for the judge provided the committee with views about the judge's character couched in the most unorthodox and ambiguous form. She argued:

A smart man concerned about making a contribution to this country as a public official, recognizing the gravity and weightiness of his responsibilities and public trust, a role model and mentor who would by his life and work show the possibilities in America for all citizens given opportunity—well, such a person such as this, Judge Clarence Thomas, would never, ever make a parallel career in harassment, ask that it not be revealed and expect to have and keep his real career. And I know he did no such thing. . . .¹⁶

On top of all this a mass of evidence of highly questionable relevance was paraded before the committee. Professor Hill's supporters filed a report concerning a polygraph test that she had allegedly passed.¹⁷ This was injected into the proceedings despite the inadmissibility of such materials in most sorts of hearings and without any real foundation to demonstrate its value to the inquiry. Similarly questionable material was propounded by Senator Hatch who trumpeted passages from William Blatty's *The Exorcist*¹⁸ and the decision in *Carter v. Sedgwick County*¹⁹ as sources from which parts of Anita Hill's testimony might have been drawn. These claims were never substantiated or tied to the proceedings in any concrete way.

The disgust felt by many Americans concerning the Hill/Thomas inquiry was undoubtedly the result of a number of different factors including the Senate's original insensitivity to charges of sexual harass-

14. *Id.*

15. *Id.* at A13; *Questions to Those Who Corroborated Hill Account*, N.Y. TIMES, Oct. 14, 1991, at A15.

16. *Excerpts, supra* note 11, at A15.

17. *Id.* at A10.

18. WILLIAM BLATTY, *THE EXORCIST* (1971).

19. 705 F. Supp. 1474 (D. Kan. 1988).

ment, the grotesquely partisan behavior of senators on both sides, and the willingness of many involved in the process to use the cheapest sort of demagogic tricks. But added to all this was the abysmal quality of the evidence presented. The seamiest proofs were constantly propounded, the most dubious opinions were repeatedly trumpeted, and materials of the most minuscule probative value were regularly relied upon, all in disregard of the evidentiary principles Americans have come to see as emblematic of our notions of fair play. The rules of evidence matter if for no other reason than that they help to deter this sort of shameful spectacle.

II. THE RULES AS A BAROMETER OF BIAS

The application of evidentiary prescriptions like those contained in the Federal Rules of Evidence is not a sure-fire guarantee of fair trials. The rules may be twisted, distorted, manipulated or ignored to produce results that reflect the deep-seated biases of those applying them. As is the case with rules of procedure in general,²⁰ evidentiary regulations rely, to a substantial degree, on judicial discretion in their application.²¹ The availability of substantial discretion leaves ample room for improper behavior by the trial judge. This problem is compounded by appellate doctrines like harmless error that facilitate the turning of a blind eye to violations of evidentiary law.²² America's courts have all too frequently manipulated notions of discretion and harmless error so that, as Justice William O. Douglas said of the Sacco and Vanzetti case: "The game was played according to the rules. But the rules were used to perpetuate an awful injustice."²³

Yet even in cases where judges misbehave and appellate courts refuse to intervene, the rules of evidence may prove important. The way the rules are applied may provide a means of assessing the evenhandedness of the proceedings and, hence, a substantial basis for criticizing offi-

20. See Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 174 (1978).

21. See Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 413 (1989); see also FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected . . .").

22. See Viliija Biliasis, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457, 459 (1983); Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1028 (1973).

23. William O. Douglas, *The Sacco-Vanzetti Case—Some Forty Years Later*, in 1 THE SACCO-VANZETTI CASE: TRANSCRIPT OF THE RECORD OF THE TRIAL OF NICOLA SACCO AND BARTOLOMEO VANZETTI IN THE COURTS OF MASSACHUSETTS AND SUBSEQUENT PROCEEDINGS 1920-27, at XV [hereinafter TRANSCRIPT].

cial action. A careful examination of a judge's evidentiary rulings will frequently provide the most clear-cut measure of his or her bias. The rules in this way create a context in which the overall integrity of a trial may be ascertained. This is not to say that rules of evidence will always expose judges engaged in partisan manipulation, or unfailingly reveal judicial animosity, but rather that such rules will, in many cases, provide solid proof of prejudice.

A useful illustration of evidence rules' ability to provide a barometer of bias is provided by the Sacco and Vanzetti case.²⁴ In that 1921 criminal prosecution, two Italian immigrant anarchists were accused of having committed a double murder while robbing a shoe company in South Braintree, Massachusetts, of its \$15,000 payroll.²⁵ As part of its case-in-chief the government offered the testimony of Carlos Goodridge, a salesman, who stated that on the day of the robbery he heard shots while playing pool in Magazu's poolroom on Pearl Street in South Braintree. He stepped outside to investigate and claimed that he saw the defendant, Sacco, ride by in the robbers' getaway car.²⁶ This was important testimony because Goodridge was one of perhaps two or three witnesses who could reasonably claim to have had even a decent glimpse of Sacco.²⁷ On cross-examination Vanzetti's counsel, Jeremiah McAnarney, asked if Goodridge were a defendant in a criminal case. The following discussion then ensued between McAnarney and the trial judge, Webster Thayer:

The Court. That is not a competent question.

Mr. McAnarney. I think it would be if he was.

The Court. Oh, no. A man that has been convicted, then you can use that record—

Mr. McAnarney. If your Honor please—

The Court. —but not until. You don't mean, do you, before a man has had a trial, you are going to use that as evidence of guilt?

Mr. McAnarney. If your Honor please, I think I would be entitled if the man is before the criminal side of this court and is

24. *Commonwealth v. Sacco*, 151 N.E. 839 (Mass. 1926).

25. For factual descriptions and analyses of the Sacco and Vanzetti case see FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* (1961); G. LOUIS JOUGHIN & EDMUND M. MORGAN, *THE LEGACY OF SACCO & VANZETTI* (1948); FRANCIS RUSSELL, *SACCO & VANZETTI: THE CASE RESOLVED* (1986); FRANCIS RUSSELL, *TRAGEDY IN DEDHAM* (1962) [hereinafter *RUSSELL, TRAGEDY IN DEDHAM*]; WILLIAM YOUNG & DAVID E. KAISER, *POST-MORTEM: NEW EVIDENCE IN THE CASE OF SACCO AND VANZETTI* (1985).

26. *Sacco*, 151 N.E. at 851.

27. See JOUGHIN & MORGAN, *supra* note 25, at 77-81.

now testifying on behalf of the Commonwealth, I would be entitled to show it.

The Court. I should exclude it.

Mr. McAnarney. Your Honor will save me an exception.

The Court. Certainly.

Mr. Moore. An exception for the defendant Sacco.

The Court. There is no difference between witnesses, whether they appear for the Commonwealth or for the defendant. The law is the same for all witnesses, and you can't attack any witness's credibility except by showing a record of conviction, and the record of conviction means a sentence, a judgment pronounced by the court, and until there has been a judgment pronounced by the court, the evidence is not competent. Therefore, I exclude it.²⁸

The propriety of this ruling was certainly open to question, especially in light of the facts that Goodridge was on probation due to a plea in the case referred to by Mr. McAnarney, and was clearly vulnerable to government pressure to testify in a way that would benefit the prosecution's case.²⁹ Yet, standing alone, this bit of interrogation and evidentiary ruling might not mean too much, especially because of the great length of the trial and the large number of witnesses involved.³⁰

What makes Judge Thayer's tightly constrained evidence ruling with respect to Goodridge revealing is how, despite the judge's often proclaimed evenhandedness,³¹ it starkly contrasts with the latitude permitted the prosecution when the two defendants, most particularly Sacco, took the stand. After Sacco testified in his own behalf he was cross-examined for two days by prosecutor Frederick Katzmann. This interrogation stretches to almost 100 pages of closely printed transcript.³² Katzmann began his questioning by asking about Sacco's decision to

28. 1 TRANSCRIPT, *supra* note 23, at 546-47.

29. In *Davis v. Alaska*, 415 U.S. 308 (1974), the Supreme Court identified such pressures as a significant potential cause of bias. The Court held that a defendant must be allowed to explore such questions during the impeachment of government witnesses. *Id.* at 318.

30. The jury selection process began on May 31, 1921, and the trial concluded on July 14, 1921. See 1-2 TRANSCRIPT, *supra* note 23. The prosecution offered 59 witnesses and the defendants called 99. See FRANKFURTER, *supra* note 25, at 9.

31. Early in the trial for example, Judge Thayer declared:

I always allow the greatest possible latitude in these matters to both sides in order that the jury may get all there is that is material upon all the issues involved in this case. If I put up the bars on one side, then I must put them up on the other, and that I dislike to [do] very much with either.

1 TRANSCRIPT, *supra* note 23, at 165.

32. See 2 TRANSCRIPT, *supra* note 23, at 1867-1961.

avoid the military draft in 1917 by moving to Mexico with a number of anarchist associates. The examination went as follows:

Q. [By Mr. Katzmann.] Did you say yesterday you love a free country? A. Yes, sir.

Q. Did you love this country in the month of May, 1917?

A. I did not say,—I don't want to say I did not love this country.

Q. Did you love this country in the month of [sic] 1917?

A. If you can, Mr. Katzmann, if you give me that,—I could explain—

Q. Do you understand that question? A. Yes.

Q. Then will you please answer it? A. I can't answer in one word.

Q. You can't say whether you loved the United States of America one week before the day you enlisted for the first draft? A. I can't say in one word, Mr. Katzmann.

Q. You can't tell this jury whether you loved the country or not? Mr. Moore. I object to that.

A. I could explain that, yes, if I loved—

Q. What? A. I could explain that, yes, if I loved, if you give me a chance.

Q. I ask you first to answer that question. Did you love this United States of America in May, 1917? A. I can't answer in one word.

Q. Did you love this country in the last week of May, 1917? A. That is pretty hard for me to say in one word, Mr. Katzmann.

Q. There are two words you can use, Mr. Sacco, yes or no. Which one is it? A. Yes.

Q. And in order to show your love for this United States of America when she was about to call upon you to become a soldier you ran away to Mexico? Mr. Jeremiah McAnarney. Wait.

The Court. Did you?

Q. Did you run away to Mexico?

The Court. He has not said he ran away to Mexico. Did you go?

Q. Did you go to Mexico to avoid being a soldier for this country that you loved? A. Yes.

Q. You still loved America, did you? A. I should say yes.

Q. And is that your idea of showing your love for this Country? A. [Witness hesitates.]

Q. Is that your idea of showing your love for America? A. Yes.

Q. And would it be your idea of showing your love for your wife that when she needed you you ran away from her?

A. I did not run away from her. Mr. Moore. I object.

The Witness. I was going to come after if I need her.
The Court. He may answer. Simply on the question of credibility, that is all.

Q. Would it be your idea of love for your wife that you were to run away from her when she needed you? Mr. Jeremiah McAnarney. Pardon me. I ask for an exception on that.

The Court. Excluded. One may not run away. He has not admitted he ran away.

Q. Then I will ask you, didn't you run away from Milford so as to avoid being a soldier for the United States?

A. I did not run away.

Q. You mean you walked away? A. Yes.

...

Q. You don't believe in war? A. No, sir.

Q. Do you think it is a cowardly thing to do what you did? A. No.

Q. Do you think it is a brave thing to do what you did? A. Yes, sir.

Q. Do you think it would be a brave thing to go away from your own wife? A. No.

Q. When she needed you? A. No.

...

Q. Why didn't you stay down in Mexico? A. Well, first thing. I could not get my trade over there. I had to do any other job.

Q. Don't they work with a pick and shovel in Mexico?

A. Yes.

Q. Haven't you worked with a pick and shovel in this country? A. I did.

Q. Why didn't you stay there, down there in that free country, and work with a pick and shovel? A. I don't think I did sacrifice to learn a job to go to pick and shovel in Mexico.

...

Q. Is it because,—is your love for the United States of America commensurate with the amount of money you can get in this country per week? A. Better conditions, yes.

Q. Better country to make money, isn't it? A. Yes.

Q. Mr. Sacco, that is the extent of your love for this country, isn't it, measured in dollars and cents? Mr. Jeremiah McAnarney. If your Honor please, I object to this particular question.

The Court. You opened up this whole subject.

Mr. Jeremiah McAnarney. If your Honor please, I object to this question. That is my objection.

The Court. The form of it?

Mr. Jeremiah McAnarney. To the substance and form.

Mr. Katzmann. I will change the form, if your Honor please.

The Court. Better change that.

Q. Is your love for this country measured by the amount of money you can earn here? Mr. Jeremiah McAnarney. To that question I object.

The Court. Now, you may answer. A. I never loved money.

Mr. Jeremiah McAnarney. Save my exception.

The Court. Certainly.³³

Thereafter the prosecutor explored, in great detail, Sacco's views about Harvard University, as well as other cherished Massachusetts institutions,³⁴ and delved into the defendant's reading habits, placing special emphasis on the radical nature of the publications Sacco received.³⁵

33. *Id.* at 1867-70.

34. *Id.* at 1879-81.

35. *Id.* at 1881-84.

The truly extraordinary range of impeachment allowed the prosecution—as contrasted with that permitted the defendants—in the Sacco and Vanzetti trial must be viewed as exceedingly troubling. The prosecution was permitted to parade the most prejudicial sorts of information before a jury that, because of the times, was highly sensitive to issues concerning military service and radical activity.³⁶ At the same time, the defendants were not even given an opportunity to explore a rather clear source of potential bias. This disparity of treatment strongly suggests that Judge Thayer was improperly biased against the defendants, a proposition borne out by some of the judge's out-of-court remarks.³⁷

What a close analysis of the application of the rules of evidence does is document the nature and extent of Judge Thayer's prejudice. It provides a window into the judge's mind and hard proof of his animosity toward the defendants despite repeated protestations to the contrary. In a world where benchmarks of fairness are hard to come by, where "spin doctors" and public relations wizards are constantly at work, this is at least a place to start in assessing actual human attitudes and the quality of judicial conduct. Whether the system, especially courts of appeal, choose to take notice of such information or not, it exists and can serve an important role in informing us about the quality of the justice dispensed in our courts.

The existence of an evidentiary code and espoused concern about its enforcement has another salutary effect, as well. It almost inevitably leads to the creation of a body of appellate decisions interpreting and effectuating the evidentiary rules. The creation of such a body of precedent places a significant burden on reviewing courts to act in conformity with prior decisions. The web of precedent makes it difficult for those in positions of appellate authority to ignore grave errors in the cases that come before them. While elaborate excuses may be provided by appellate courts to justify aberrant behavior at trial, the difficulty of maintaining such an approach for very long is quite clear.

Judges must eventually enforce the rules they claim govern their conduct or face the clearest sort of proof of their dishonesty. The rule of law is premised precisely upon this notion, that the web of rules, prece-

36. See FRANKFURTER, *supra* note 25, at 35-62; RUSSELL, TRAGEDY IN DEDHAM, *supra* note 25, at 71-92.

37. Among those Judge Thayer is reported to have made prejudicial statements to were the following individuals: Frank P. Sibley ("I'll show them that no long-haired anarchist from California can run this court!"); Lois Rantoul, George U. Crocker, and Professor James P. Richardson ("Did you see what I did with those anarchistic bastards the other day. I guess that will hold them for a while. Let them go to the Supreme Court now and see what they can get out of them."). See JOUGHIN & MORGAN, *supra* note 25, at 147-48.

dents and procedures eventually ties the hands of those who would manipulate them for personal or class advantage.³⁸ The evidentiary code is among the strands that can bind the courts. In a setting where bias threatens to overwhelm adjudicators, rules of evidence and the precedents they generate provide some restraint.

In the Sacco and Vanzetti case the Massachusetts Supreme Judicial Court seemed to ignore precedent. In striving to uphold Judge Thayer's rulings the court authorized the broadest imaginable impeachment.³⁹ This decision was in conflict both with the court's prior rulings⁴⁰ and evidentiary decisions from all over the United States.⁴¹ Creating a rule sanctioning impeachment of the most wide-ranging scope, however, did not solve all the appellate court's problems. The court still had to confront Judge Thayer's crabbed approach to the impeachment of Carlos Goodridge. By upholding that determination,⁴² as well as those involving Sacco, the Massachusetts Supreme Judicial Court embraced diametrically opposed positions in the same case and left itself open to the most withering sort of criticism. That criticism was delivered and the indefensibility of the court's position laid bare in a Yale Law Journal Note that declared:

But who can doubt that being a defendant in a criminal case to the layman injures the character, and is under the logic of the Sacco case admissible to injure it? And if this is true, is not a plea of guilty to a charge of larceny at least as relevant to credibility as a knowledge that "Harvard College educates more boys of poor people free than any other university in the United States of America"? . . . Whatever may be the case in other jurisdictions, Massachusetts can hardly justify giving the narrowest possible range to the shortest and simplest method of impeachment, a conviction, and the widest possible range to the most protracted and dangerous method, cross-examination to an unconventional past.⁴³

While these criticisms did not save Sacco and Vanzetti or result in

38. See EDWARD P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 258-69 (1975).

39. See *Commonwealth v. Sacco*, 151 N.E. 839, 856 (Mass. 1926). My analysis of the appellate court's failure is based upon the argument presented in Note, *Cross-Examination to Impeach*, 36 *YALE L.J.* 384, 385 (1927).

40. See *Sullivan v. O'Leary*, 15 N.E. 775 (Mass. 1886); Note, *supra* note 39, at 385 n.5 (citing *Commonwealth v. Homer*, 127 N.E. 517 (Mass. 1920)).

41. See Note, *supra* note 39, at 387 n.11.

42. See *Sacco*, 151 N.E. at 851.

43. See Note, *supra* note 39, at 388-90.

the immediate restoration of fairness, they did serve as the groundwork for challenges to the behavior of the appellate judges. Evidentiary rules and precedents exposed the dubious nature of the Massachusetts Supreme Judicial Court's position and made it vulnerable to the sort of attack that could lead to the restoration of the rule of law.

III. RULES AND THE FIXING OF MINIMUM STANDARDS OF DECENCY

The rules of evidence may also help establish minimum standards of decency for the conducting of trials. While evidence law, as the Sacco and Vanzetti case illustrates, is far from a clear and uniformly effective barrier to improper adjudicatory behavior, the rules can and do provide certain bright line distinctions about what ought to be viewed as just and unjust procedure. Frequently, these lines have been drawn in response to experiences in infamous cases that dramatize the consequences of unconstrained action. One of the clearest of these was the trial of Sir Walter Raleigh in 1603 on a charge of high treason against James I.

Raleigh was said to have sought the overthrow of the King and his replacement by Arabella Stuart.⁴⁴ He was tried before a jury in a bruising prosecution conducted in the most ruthless manner by then Attorney General Edward Coke. The key witness against Raleigh was an alleged co-conspirator named Lord Cobham. Despite Raleigh's repeated demands, Cobham, who was in the government's custody, was not produced and Sir Walter was tried on the basis of several of Cobham's out-of-court statements.⁴⁵ These were supported, albeit weakly, by the testimony of a ship's pilot named Dyer who stated:

I came to a merchant's house in Lisbon, to see a boy that I had there; there came a gentleman into the house, and enquiring what countryman I was, I said, an Englishman. Whereupon he asked me, if the king was crowned? And I answered, No, but that I hoped he should be so shortly. Nay, saith he, he shall never be crowned; for Don Raleigh and Don Cobham will cut his throat ere that day come.⁴⁶

Faced with such proofs Raleigh is said to have declared: "[I]f witnesses are to speak by relation of one another, by this means you may have any man's life in a week, and I may be massacred by mere hearsay as Sir Nicholas Throckmorton was like to have been in Queen Mary's

44. Raleigh's Case, 2 St. Tr. 1, 1 (1603).

45. *Id.* at 10-27.

46. *Id.* at 25.

time."⁴⁷ Raleigh's prediction proved all too accurate and despite being able to produce a written recantation by Cobham,⁴⁸ Sir Walter was condemned and executed.

The unfairness of the proceeding against Raleigh moved Englishmen to address both their treason laws and the hearsay rule.⁴⁹ Over the course of the next century, during one of the most tumultuous periods in English political history, rules restraining hearsay, at least in prominent treason trials, were developed.⁵⁰ They served as the foundation upon which still wider application of the hearsay concept was undertaken and minimum standards of decency established.⁵¹ The sort of protection extended through limitations on hearsay is far from a guarantee of fair and decent trials but it does begin to hedge what the state may do in prosecuting its citizens. There is lasting value in the establishment of such limits.

IV. EVIDENCE RULES AND THE LEGAL PROFESSION

In the preceding parts of this commentary it was my objective to describe the value of rules of evidence in situations involving the most dire threats of injustice. In the less highly charged everyday life of the courts the rules also play an important part. As delineated by Jeremy Bentham almost two hundred years ago, exclusionary rules of evidence "are at once the engines of [the lawyers'] power, and the foundation of his claim to the reputation of superior wisdom, and recondite science."⁵² Bentham saw this effect of the rules as an unwholesome curtailment of courtroom access to information. I disagree and see it as one of the fundamental checks on the judiciary, providing advocates with a means of cabining the power of judges and reinforcing the adversarial nature of courtroom proceedings.

Rules of evidence place power in lawyers' hands. That power is real and effective in all but those cases where judges are willing to overtly

47. 9 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 445 (3d ed. 1944).

48. *Raleigh's Case*, 2 St. Tr. at 28-29.

49. See RICHARD O. LEMPERS & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 349 (2d ed. 1983).

50. See WILLIAM NELSON, *THE LAW OF EVIDENCE* 231-32 (1717) (attributing most hearsay rulings cited in his treatise to judges responding to evidentiary issues arising in series of treason cases referred to as Popish Plot prosecutions).

51. See Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 564-72 (1990) (hearsay doctrine not often invoked in routine felony proceedings in Old Bailey until 1730s and did not become regular part of proceedings until sometime after mid-century).

52. 2 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 48 (Garland Publishing 1978) (1827).

manipulate the process to serve their strongest prejudices. The rules give lawyers a substantial say in what proofs may and may not be admitted at trial. This power restrains the judge's authority to pursue his or her own interests or seize control of the case. It reinforces the adversaries' control over the gathering and offering of testimony. While the system of checks and balances established by the evidence rules is not always obeyed, it does help to create the adversarial context in which our system operates.

The division of power arranged by the rules works because of America's continuing reliance on lay juries. Together, lawyers empowered by the rules of evidence and jurors vested with the final say about the facts can form a substantial barrier to judicial hegemony. This arrangement helps preserve democratic participation in the judicial system as well as an adversarial way of doing business. It provides a tangible restraint on the power of government. As William Garrow, a celebrated courtroom advocate of the late eighteenth century,⁵³ put it while arguing a case in the Old Bailey in 1787: "The King cannot break down, or infringe, or invade any one of the rules of evidence; he has no prerogative to say that innocence shall not be protected."⁵⁴ The rules of evidence do matter. Both in extreme situations and everyday practice they serve a vital function in keeping the system fair and power balanced.

53. For a brief discussion of Garrow's career, see Landsman, *supra* note 51, at 551-64.

54. *Reilly's Case*, OLD BAILEY SESSION PAPERS, Sept. 1787, at 1073.