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WHAT'S THE MATTER WITH EVIDENCE?

*Kenneth W. Graham, Jr.**

“Does evidence law matter?” Why ask someone who put three kids through college on less than half of the Federal Rules of Evidence? Perhaps because few other witnesses to the importance of evidence law are unimpeachable. Consider:

—Richard Nixon, who wanted the Watergate investigation moved from the Ervin Committee to a federal grand jury because he (erroneously) supposed that the rules applied in grand jury proceedings;¹

—Susan Komisaruk, who saw a press release stating her justification for a kamikaze attack on the Warfare State edited into a confession of guilt because someone forgot Rule 106;²

—Dalkon Shield victims, who were subjected to sexist and humiliating questions about their personal sexual and toilet practices because rules of evidence do not apply in discovery;³

—the Fourth Circuit, which was able to deny a claim for the parent-child communications privilege and accept expansive claims for governmental privilege because Congress could not understand the politics of privilege.⁴

It would be much easier to assemble an impressive list of those who don't think much of the rules of evidence. For example:

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1. RICHARD M. NIXON, *THE WHITE HOUSE TRANSCRIPTS* 171 (Gerald Gold ed., 1974); see FED. R. EVID. 1101(d)(2) (providing that Rules are not applicable to grand jury proceedings).

2. *United States v. Komisaruk*, 885 F.2d 490, 495-96 (9th Cir. 1989); see FED. R. EVID. 106 (providing that when any statement is introduced, adverse party may require introduction of any other statement that ought to be considered contemporaneously).

3. MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALCON SHIELD* 194 (1985); see FED. R. CIV. P. 26(b)(1).

4. See *United States v. Jones*, 683 F.2d 817, 818-19 (4th Cir. 1982) (refusing to recognize parent-child privilege); *In re United States Dep't of Justice*, No. 87-1205, slip op. at 3 (4th Cir. Apr. 7, 1988) (unpublished opinion extending Classified Information Procedures Act, 18 U.S.C.A. app. 3, §§ 1-16 (1985), which by its own terms is limited to criminal cases, to civil case cited in *United States v. Smith*, 706 F. Supp. 593, 595 (M.D. Tenn. 1989)). Congress did not like what the Advisory Committee had done with privileges so it deleted the privileges article and left the common law privileges in place, apparently in the mistaken expectation that this would prevent the sort of class-biased privileges that the Advisory Committee had proposed. See 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5422 (1980).

—bar examiners, who have turned the subject over to the kind of people who think that the right answer to a multiple-choice evidence question is the one most often picked by those with high L.S.A.T. scores;⁵

—lawyers from Tennessee, who (if appellate opinions are any indication) haven't made an evidentiary objection in years;⁶

—appellate judges in California, who have turned the California Evidence Code into law's equivalent of the Dead Sea Scrolls by seldom publishing opinions that discuss evidence issues;⁷

—law review editors, who publish comments based on "facts" gleaned from Wall Street Journal editorials while rejecting evidence articles as "mere doctrinal analysis";⁸

—"elite law schools," most of whom have no practicing evidence scholars on their faculties.⁹

But perhaps the most credible witnesses to the triviality of evidence law would be those who teach it. Few people listed in the Association of

5. According to hearsay reports, the Multi-State Bar Exam continues its practice of giving multiple-choice questions with more than one correct answer and requiring test takers to choose the "best" one. The mentality of the test makers was revealed to me several years ago when I was asked to consult with the California Bar Examiners on alternative testing methods to the essay question. When I met with the "expert" (a non-lawyer) employed by the Committee of Bar Examiners to discuss my own examinations, I explained to him that one of the virtues of my tests was that they sometimes rewarded people who had otherwise undistinguished academic records based largely on essay examinations. The "expert" blanched. That would not do, he explained to me, because my tests are "invalid"; a "valid" test, I discovered, was one that rewarded the same people who did well on essay examinations and the Law School Aptitude Test. The proposed alternative evidence examination was not adopted.

6. Those of us who read many appellate opinions are often struck by the differing courtroom cultures in which the supposedly "uniform" law of evidence operates. There is wide variation from state to state in the frequency with which evidentiary objections surface in the appellate reports and the style in which they are resolved. Why the "law and society" people have never picked up such questions for empirical study is a mystery.

7. This is an open scandal in the Golden State. I have it by very good hearsay that while lawyers and judges are not allowed to cite unpublished opinions in briefs and opinions, in at least some of the intermediate appellate courts this is not construed as barring allusions to such opinions in oral argument in cases between institutional litigators.

8. Over the last 15 years I have submitted more than 100 suggestions for comment topics, mostly on evidentiary issues, to the editors of a local law review. Students who persist with such topics despite advice that they are not "comment-worthy" have had great difficulty getting their comments published. In one case, the student writer had to mount a lobbying effort among the evidence faculty to compel the editors to publish what may be the best thing ever written on the subject with which it deals. Happily, not all law reviews take such a narrow view of their role. See, e.g., Michael H. Graham, *Special Topics in the Law of Evidence*, 42 U. MIAMI L. REV. 829 (1988).

9. The reader is invited to use any list of the top 10 law schools and try to recall the names of the evidence teachers at these institutions (no peeking at the A.A.L.S. Directory, please) and the articles they have written in the last 20 years.

American Law Schools (A.A.L.S.) Directory of Law Teachers under the heading "Evidence" have found anything in the subject to stir them to write.¹⁰ Many continued to teach the common law of evidence long after it had been supplanted by the Federal Rules of Evidence and similar state codifications. The published casebooks suggest that some still teach the rules as if they were no more than tools for trial tactics or apolitical compromises among the competing goals of fairness and efficiency. Conversations at an A.A.L.S. teaching conclave lead me to believe that most evidence teachers, for understandable but not always persuasive reasons, teach only a small portion of the subject (most commonly hearsay, relevancy and witnesses) and prefer to skip the more blatantly partisan rules, such as privileges and quasi-privileges.

There are a number of good reasons for evidence teachers to be embarrassed by their subject. But in my view, a large part of the blame (or credit) for the current state of evidentiary teaching and scholarship should go to the ideology that dominates discussion of the subject—a combination of attitudes, assumptions and amnesia that its adherents like to call the "rationalist tradition," but that I prefer to label the "Progressive Procedural Paradigm."¹¹ If one takes the Progressive view that existing rules of evidence are anachronistic obstacles to the search for Truth that we will abandon when the light of Science leads us to a purer procedure for resolving disputed questions of objective fact, then teaching students to understand and use those rules makes one something of a traitor to the cause of Progress. Once the Federal Rules of Evidence made it clear to everyone just how far we were from entering the Progressive Valhalla, trying to teach students that the Rules are merely temporary expedients to be overthrown or abandoned is to play out a ludicrous academic version of *Waiting for Godot*.

10. I have the impression that things may have improved somewhat in the last 10 years, but a decade or so ago I was asked to write an article for a proposed law review symposium on the 10 best evidence articles of the previous decade. A preliminary reconnoiter suggested to me that it would be difficult to predict who would be more outraged by such a listing—those who found their work ranked with articles on the lower half of the list or those who found their work left out.

11. I had thought this was a reasonably obvious phenomenon when it was first brought to my attention in an article written over 20 years ago. See Douglas Ayer, *In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period*, 23 STAN. L. REV. 1049 (1971). I discovered otherwise when I mentioned it in a book review. Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 TEX. L. REV. 929, 940 (1983) (reviewing JULIUS BYRON LEVINE, *DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS* (1982)). For a not very successful attempt to sketch the tenets of the ideology, see Kenneth W. Graham, Jr., "There'll Always Be An England": *The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204, 1228-30 (1987) (reviewing WILLIAM TWINNING, *THEORIES OF EVIDENCE: BENTHAM & WIGMORE* (1985)).

A poignant example of the absurdities of the Progressive posture comes from a recent gathering of these scholar-politicians. One would-be revolutionary, buoyed with the enthusiasm that comes from confusing originality with a bad memory, trotted out the old Progressive argument that because we all rely on hearsay in conducting our daily affairs, we ought to be willing to let judges and jurors use it in deciding lawsuits. No one present apparently had the heart to point out to this precocious Mr. Magoo that while we do all rely on hearsay, that is hardly a matter of choice. Given the opportunity, most of us would prefer to put the used car salesman under oath and subject Dan Rather to cross-examination.

We can safely assume that most evidence teachers are aware that judges and litigators are not the only people in the world who have to act on the basis of knowledge that was not obtained through personal investigation and perception. Yet most of us teach evidence as if it was useful only to those who want to pass the bar and become famous litigators. I know I do. But even I can imagine a course called "Evidence in Everyday Life" in which the rules of evidence are used as a source of principles for students to use in making judgments of fact in their personal and professional lives, even if they never see the inside of a courtroom. If the hearsay reports are reliable, my colleague Robert García did something like this in a very effective class based on the televised Clarence Thomas confirmation hearings.

It is not surprising that few evidence teachers take this approach. Many of the same people who profess not to believe in the hearsay rule have little difficulty believing what they read in the *New York Times*.¹² The morning after Soviet pilots mistakenly shot down Korean Airlines Flight 007, I was exchanging hearsay-based opinions on this event with several people. A well-known evidence teacher suggested that the incident would have a demoralizing effect on what he called "the peace movement." There was agreement all around, even after it was pointed out that the tragedy seemed to confirm the fears of many peace activists by showing how we might stumble into a nuclear war. As I walked away from this puzzling conversation, I spotted a copy of that morning's newspaper abandoned on the floor. It carried a small headline on the front page to the effect: "Peace Movement Demoralized By Attack."

12. This is not an original observation. When I was very young and situated in a different educational institution, I once remarked to my mentor that the faculty seemed much more willing to discuss an unfolding historical event in the afternoon than they were in the morning. My mentor replied, in words or substance, "Yes, until the *New York Times* arrives in the library at noon, they don't know what they are supposed to think."

Our role as critics of the political manipulation of the rules of evidence by judges and lawyers can lead us to forget that the rules would not have survived this long if they did not contain a core of common sense. This can be dramatized by comparing law to the work of professionals who pride themselves on having no rules of evidence. I once read a highly acclaimed historical work in which an important part of the argument rested on the publication in a union newspaper of what purported to be a letter from a union member.¹³ Surely the author was correct in not ignoring the letter merely because it was inadmissible hearsay, but to rely heavily on it without any attempt to establish its authenticity seems foolhardy. One assumes that the author was aware that unions of that era were frequently infiltrated by Pinkertons who were as willing to engage in COINTELPRO activities as Mr. Hoover's F.B.I. minions. In another place in the same work, the author quotes at length the testimony of a witness at a legislative hearing without alerting the reader to the fact that this witness was an attorney for one of the parties in the controversy being discussed—a fact relevant to the use being made of his testimony, but not likely to be known by many readers.

Given their gleeful contempt for lawyers, journalists are an especially apt exemplar of the consequences of the untutored use of evidence. The lead story in the *Los Angeles Times* on a recent Thursday morning began this way:

Reviled by most of the world, its grip on the Soviet Union waning by the hour, the hard-line Kremlin junta that ousted President Mikhail S. Gorbachev collapsed Wednesday, and Gorbachev returned to Moscow, reassuring his people and the world that he is again in "full control."¹⁴

If we make the reasonable inference that the writer of these lines does not speak Russian, there is only a single fact in this entire paragraph of which he could have had personal knowledge. The rest is a mess of highly questionable opinions with uncertain bases and which could only have the most tenuous relationship to empirical fact. Since many Soviet citizens were sympathetic to the coup and most Chinese probably una-

13. Here, as elsewhere in this Essay, I have not thought it desirable to single out by citation individuals I have chosen as exemplars of much wider failings. If the examples do not resonate with the reader's own experience, it is doubtful that a footnote filled with documentation will make my argument more persuasive. In any event, I have little interest in persuading those who will only believe when they can see someone squirming in pain.

14. *Soviet Coup Collapses; Gorbachev Returns*, in "Full Control," L.A. TIMES, Aug. 22, 1991, at A1. Readers who undertake a similar analysis of their own newspapers will likely discover that this sort of "objective, factual" reporting (to quote an *L.A. Times* TV ad) is not atypical.

ware of it, it seems rash to suppose that this substantial portion of "the world" was busy reviling the junta. "Grip on the Soviet Union" seems an inept way to characterize the precarious position of plotters dependent on the support of key military and security forces for their success. "Hard-line Kremlin junta" may be useful to dramatize its "collapse," but it is a misleading description of either the goals or tactics of the bungling bureaucrats who were supposed to be reviving Stalinism by holding press conferences.

In the face of this kind of stupidity in dealing with fact, it is difficult to keep a straight face when reformers argue that courts would be improved if judges emulated historians and journalists and abandoned efforts to develop rules or principles for dealing with evidence. True, we may reasonably question whether exclusion of evidence is the best way to implement such rules or principles. It may well be that society would be better off if evidence were taught in kindergarten and beyond rather than only in the second year of law school. But the suggestion that we simply abolish the exclusionary rules and rely on the adversary system to produce the best available evidence seems naive in a world in which even judges and lawyers buy cars to improve their sex lives rather than to transport them efficiently from point *A* to point *B*.¹⁵

But evidence scholars have not yet developed alternatives to the exclusionary rules. Our would-be reformers rely on the quintessential capitalist doctrine of "creative destruction" and on blind faith in judicial discretion to replace the razed Wigmorean structure with something better. But the notion that self-interest moderated by a discretionary bureaucracy is an effective social regulator is hard to square with the evidence of Los Angeles, where we are busily engaged in destroying the old and constructing the new with no discernable public sense that the community is being improved. While a few individuals have enriched themselves by exploiting the faith or paranoia of others, most Angelenos take little pride in the fact that our homeless sleep in the doorways of shinier buildings than do those in Calcutta, or little comfort in the fact that if we are shot on the street it will be by someone with a more banal view of the world than the Sendero Luminoso guerrillas.

Given the messy state of the modern world, the daunting problems of epistemology, and the primitive state of the science of psychology, it is easy to understand why evidence scholars seek comfort in tending our garden of doctrine or contemplating the angelic purity of formal the-

15. Sexy cars can serve as substitutes for grades and LSAT scores too. An inspection of any faculty parking lot will disclose that while the reasons people buy particular models are complex, they are also not completely rational.

ory.¹⁶ This latter tendency is exemplified by the self-proclaimed “New Evidence Scholarship,” which looks to outsiders much like the “old conceptualism” that gave Beale a bad name. While the founding members of this school may be exempt from the charge of “pack scholarship,” the same cannot be said of all of their followers. Consider, for example, The Flatlanders. They spend their days imagining how rules of evidence might work in a world with only two dimensions—supply and demand. I would be the last person to claim that no insights into the law of evidence can be gained by exploring only one or two dimensions of the subject, such as power and greed. But so far as I can tell, the only thing The Flatlanders have discovered is the political economy of economic analysis; that is, how we can all get rich without reading the cases simply by taking in each others’ intellectual wash.¹⁷

It is to be expected that evidence scholarship will be caught up in academic fads. But it is remarkable that so far the law of evidence has been relatively untouched by recent ideological fashions other than the so-called “law-and-economics” movement. Feminists, except for some splendid early writing about character evidence in rape cases, have generally ignored the law of evidence. Perhaps the desire to avoid self-ghettoization sometimes associated with family law may explain why there is

16. I do not claim that I have read everything written recently on the law of evidence. Moreover, what I have read is badly skewed in the direction of those topics covered in the first five articles of the Federal Rules of Evidence. But while I may have missed some significant work, the remarks in the text seem like a reasonable description of the major tendencies in the current literature.

17. Those who engage in the much despised “mere doctrinal scholarship” must read at least some of the cases and statutes and examine enough of the prior scholarship to determine that our “brilliant idea” is not simply unconscious plagiarism of something we read years ago. Law review editors generally still require us to have footnotes that demonstrate some tenuous connection between our descriptions and reality. There is the recurrent nightmare that months of work will be undone by judicial decision or legislative enactment or that someone finding the case we miss will expose us as the shoddy scholars we secretly fear we are. How much more pleasant to simply sit down to write encumbered by little more than a simplistic version of the law and a vivid imagination, and write stories about how the law operates in a universe with only two dimensions. Then in the afternoon one can fax off the latest opus to other members of the coterie who will eagerly tear into the piece with a “Reply to Professor Wildwit” to which can be appended an endless series of rebuttals and surrebuttals that spiral off into increasingly surreal worlds.

Since there are vast spaces of the law yet to be invaded by the hordes of Flatlanders, it is easy to find an untouched topic that one can be confident, without ever going into the library, has never been subjected to economic analysis before, thus saving time that might otherwise be devoted to the tedious task of research. If there is a place where the argument does not seem to hang together, one can always cut out the troublesome paragraph and insert a chart or graph. Then at faculty meetings one can drop snotty comments about the lack of productivity on the part of the doctrinal drones, confident that they lack the imagination to contemplate homicide.

no womanist writing on spousal privileges. While their sisters in science have been able to find sexist assumptions in the epistemology of the men in white coats, surely it is reasonable to suppose that the same virus has infected those in black robes. Evidence has similarly been ignored by the academic guerillas in the Critical Legal Studies movement. When even Republicans can see class bias in the law of privilege, it is strange that the members of the Marxist 4-H Club have averted their gaze.¹⁸

Perhaps the problem with evidence law is that it is, in the argot of the 1960s, "not where it's at." Legal scholars are attracted to topics where they think their writing can make a difference. What do they see when they look at evidence? A field where several generations of scholars have failed to daunt the authority of a treatise written nearly a century ago. A field where a series of increasingly conservative codifications have failed to dislodge the common law mentality of judges and lawyers who continue to look to cases and commentators rather than to statutes and rules for authority. A field of Dreamsicles, where fools go through the motions of teaching and research and from which the wise avert their eyes.

Yet while many evidence teachers view evidence law with a mixture of embarrassment and contempt, the process it purports to regulate has a continuing fascination for the popular mind. The judicial trial is the setting for more books, movies and television shows than the operating room, the boardroom, the press room or the Oval Office. Is this because the judicial arena partakes of the conflict of the battlefield and the prize ring but is far less expensive to film? Or is it because in a world dominated by the official truths of media moguls, the courtroom is one of the few public places where competing truths can visibly contest, a place where the truths we hate must not only be heard but transcribed and preserved? But whether a trial is pantywaist warfare, the symbolic remnants of a past we must close behind us, or a doorway to the future in which the Other is heard and humanized rather than denounced and destroyed, surely trials provide material for scholars as well as script writers.

What's the matter with evidence? Better to ask: "What is wrong with the people who ask or answer such questions"? Do they lack the imagination to see what is happening to the law of evidence or the courage to confront it? Do they lack the vision to go beyond their predecessors or are they missing the hope that fueled the enthusiasm of prior

18. For those who have avoided reading works of this genre, the 4-H's are Hegel, hierarchy, hegemony and hueristics.

generations? Do they respond to this Symposium out of delight or despair?

Your witness, counsel.

