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EVOLUTION IN CHILD ABUSE LITIGATION: THE THEORETICAL VOID WHERE EVIDENTIARY AND PROCEDURAL WORLDS COLLIDE

*William Wesley Patton**

I. INTRODUCTION

Rules of evidence focus primarily on the narrow issues contested within the pleadings of a single case. A few exceptions address issues beyond the pleadings such as privileged communications made outside the courtroom, statements made during negotiations, and extra-judicial actions taken by a party such as remedial repairs. These evidentiary rules are based on broader social considerations, namely the protection of certain confidential relationships, the encouragement of compromise and settlement of disputes and the promotion of action that will further public safety.¹

This Essay suggests a need for evidentiary and procedural rules that would permit or require judges to consider the entire systemic effect of their evidentiary rulings. Such rules would address issues beyond the pleadings in a single case on the basis of the polestar policies of accurate and fair judicial determinations. The rapidly increasing number of civil disputes or criminal charges which result in a host of separate trials in different courts based upon the same factual scenarios calls for this type of analysis.² Such multiple litigation creates a complicated and dramatic matrix of procedural and evidentiary dilemmas. This Essay proposes

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1. FED. R. EVID. 501 (incorporating common law regarding privileged communications); see GLEN WEISSENBERGER, *FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY* § 501.3, at 153 (1987) (citing MCCORMICK ON EVIDENCE § 74.2, at 179 (Edward W. Cleary ed., 3d ed. 1984)) (discussing policy underlying Rule 501); FED. R. EVID. 408 (precluding admissibility of evidence of compromise or offers to compromise to prove liability for or invalidity of claim); see also FED. R. EVID. 408 advisory committee's note (discussing social policy of promoting settlement of disputes and resolving conflicts). FED. R. EVID. 407 (precluding admissibility of evidence of remedial measures to prove negligence or culpability); FED. R. EVID. 407 advisory committee's note (discussing social policy of encouraging remedial action).

2. For example, a trial court in a civil action under the Racketeer Influenced and Corrupt

that current evidentiary theory fails to prevent a collision of the conflicting evidentiary and procedural worlds arising from multiple proceedings.

The example of child abuse litigation allows an exploration of these issues because it is one substantive area of the law where a single alleged incident frequently gives rise to multiple judicial proceedings.³ Child abuse law is "quasi-civil, quasi-criminal" because it constantly changes valences between criminal and civil litigation. In addition, it is still in its evidentiary infancy, with rapidly evolving rules.⁴ In this complicated setting, an evidentiary ruling in a civil juvenile dependency proceeding may have consequences on several possible future adjudications resulting from the same facts: a civil suit by the abused child against the alleged abuser for damages; a criminal prosecution of the alleged abuser; a marriage dissolution in family court; or a juvenile delinquency case involving abuse by one child against another.⁵

Organization Act, 18 U.S.C. §§ 1961-1968 (1988) (RICO), may make evidentiary rulings that could have consequences for a parallel or subsequent criminal RICO trial.

For a discussion of the myriad state and federal statutes providing both criminal and civil remedies for violations of environmental controls, see Richard H. Allan, *Criminal Sanctions Under Federal and State Environmental Statutes*, 14 *ECOLOGY L.Q.* 117 (1987).

"Insider trading" securities cases give rise to both civil and criminal charges and may be litigated in both federal and state courts simultaneously. See, e.g., 15 U.S.C. § 78t-1(a) (1988) (providing private right of action for violations of securities regulations); *id.* § 78t-1(e) ("[A private right of action] shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this chapter, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties."); *id.* § 78u(d) (permitting Securities Commission to transmit evidence to Attorney General to institute criminal proceedings). Not only may securities violations result in separate federal civil and criminal trials based upon the same factual allegations, the state courts may also permit civil and criminal actions. See, e.g., *Binder v. Southeastern Historic Restoration, Inc.*, 711 F. Supp. 620, 623 (N.D. Ga. 1988) (declining pendent-party jurisdiction for defendant having little to do with securities fraud claim).

3. Several different disputes frequently arise from child abuse allegations. William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 *GA. L. REV.* 473, 475 (1990) [hereinafter Patton, *Parallel Lines*].

4. See *infra* notes 30-46 and accompanying text.

5. Leonard P. Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 *SANTA CLARA L. REV.* 201, 204 (1987) (discussing differences in ways juvenile courts and family courts treat issues such as hearsay, children's testimony, discovery and presumptions).

For a detailed discussion of the evidentiary and constitutional problems created by multiple trials based upon the same triggering events, see William Wesley Patton, *Forever Torn Asunder: Charting Evidentiary Parameters, the Right to Competent Counsel, and the Privilege Against Self-Incrimination in California Child Dependency and Parental Severance Cases*, 27 *SANTA CLARA L. REV.* 299 (1987) [hereinafter Patton, *Forever Torn Asunder*]; Patton, *Parallel Lines*, *supra* note 3.

Child abuse tort actions are increasing because many jurisdictions now apply a delayed discovery statute of limitations. See Ann Marie Hagen, Note, *Tolling the Statute of Limita-*

First, this Essay looks at the importance of evidentiary rules in bench trials. The strong presumptions of judicial capacity to disregard prejudicial data and the corresponding appellate court deference to the trial judges' discretion appear to diminish the importance of evidentiary rules in non-jury trials. Second, assuming that the law is correct in granting such deference to trial judges' evidentiary rulings, do evidentiary decisions in bench trials have significant impact on additional litigation based upon the same facts? Third, if trial court rulings have such an impact, can current evidentiary theory provide trial judges the power to ameliorate the prejudicial impact of evidence in subsequent or parallel proceedings? Finally, this Essay suggests that current evidentiary theory fails to address these issues outside the scope of the discrete proceeding in which an admissibility decision is made.

II. IS JUDICIAL INSULATION SUFFICIENTLY DEAFENING?

In child abuse litigation, a number of factors suggest the conclusion that evidentiary rules have little or no impact on bench trials. First, the rules of evidence have been substantially eviscerated, or at least dramatically relaxed. Modifications of the general rules have made all relevant evidence admissible, and double or triple hearsay statements are indirectly admissible when attached to a probation report.⁶ Second, the impact of this theory of broad admissibility is magnified by the presumption

tions for Adult Survivors of Childhood Sexual Abuse, 76 IOWA L. REV. 355 (1991) (advocating use of delayed discovery statutes to give child abuse plaintiffs greater opportunity to bring tort claims); Donna Wares, *The Unleashing of Memory*, CAL. LAW., July 1991, at 19, 19-20.

The number of courts in which sexual abuse allegations may be litigated could expand dramatically if Congress passes the Violence Against Women Act of 1991 which was approved by the Senate Judiciary Committee on July 18, 1991. 137 CONG. REC. D926 (daily ed. July 18, 1991). The Act was favorably reported to the Senate on October 29, 1991, 137 CONG. REC. S15,400 (daily ed. October 29, 1991), and awaits action by the full Senate. That Act "would make sexual assault a federal civil rights violation, enabling victims to sue their assailants for civil damages under federal law." Maureen Balleza, *Victims of Rape Increasingly Seek Justice in Civil Lawsuits*, L.A. DAILY J., Sept. 23, 1991, § II, at 12.

6. Many laws governing juvenile court proceedings allow that "any matter or information relevant and material to the circumstances or acts which are alleged to bring [the child] within the jurisdiction of the juvenile court is admissible and may be received in evidence." E.g., CAL. WELF. & INST. CODE § 355 (West 1984 & Supp. 1992). The reason for expanding the scope of admissible evidence in cases involving children is to give the judge "a coherent picture of the child's situation." *In re Rose Lynn G.*, 57 Cal. App. 3d 406, 426, 129 Cal. Rptr. 338, 350 (1976); see also Linda D. Elrod, *Hearsay and Custody: The Twice Told Story*, 21 FAM. L.Q. 169, 170 (1987) (statutes allow evidence for judges' consideration such as child's and parents' custody wishes, child's interaction with parents, child's adjustment to home, school and community).

See Patton, *Forever Torn Asunder*, *supra* note 5, at 336-51 for a discussion of the admissibility of evidence in probation reports prepared for dependency and parental severance trials.

that judges can—and do—disregard inappropriate prejudicial data. In child abuse dependency cases, it is almost impossible for a parent to rebut that presumption. Parents do not have an absolute constitutional right to counsel,⁷ and many who would need court-appointed counsel often have no expert to argue their trial or appeal.⁸

Some critics and courts have questioned the law's presumption that judges conducting bench trials are able to disregard highly prejudicial evidence.⁹ Other commentators argue that rules of evidence were traditionally promulgated to control juries, not judges, and therefore, the philosophy of contemporary evidence law supports the admissibility of all evidence in bench trials.¹⁰

Even if one agrees that judges are better able than jurors to avoid intellectual errors or to trace a chain of inferences, the presumption that they can disregard inappropriate prejudicial data is overbroad. It assumes that judges somehow are sufficiently more capable than jurors to disregard emotionally prejudicial data.¹¹ The United States Supreme Court has not welcomed empirical psychological research when deciding

7. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 26-27 (1981).

8. Patton, *Forever Torn Asunder*, *supra* note 5, at 299-320.

9. See, e.g., Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 445 (1989) ("A judge cannot keep prejudice to a fair minimum without, in a rough and ready way, tabulating it."); Teri Kathleen Martin, *Developing Disposition Decisionmaking Guidelines For Juvenile Courts* 80 (1985) (unpublished Ph.D. dissertation, University of Illinois at Chicago) ("Emotionalism rather than reason appears to prevail [even in the] legal community charged with decision-making responsibilities for the alleged child molester.").

"When one mentions the phrase 'child molester,' the common attitude is one of immediate horror and condemnation. Even the professional community responds by recoiling." Arlyne Marjorie Diamond, *The Child Molester and the Legal Process* 11, 23 (1984) (unpublished Ph.D. dissertation, Pacific Graduate School of Psychology) ("[The emotional response to child molestation is such that] dispassionate questions automatically asked in most other cases where someone has been accused of a crime are not even considered."). But see Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudication: A New Approach*, 1991 U. ILL. L. REV. 353, 354 (rules of evidence designed for juries, not judges).

10. Professor Rosenberg has identified five major reasons for giving trial judges broad discretion: (1) economize judicial resources; (2) maintain morale among judges; (3) ensure finality; (4) avoid impracticability of formulating precise rules; and (5) recognize superiority of the trial judge's ability to consider more factors than appellate courts. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 660-63 (1971).

11. See *Commonwealth v. Dumas*, 445 A.2d 782, 788 (Pa. Super. Ct. 1982); *Commonwealth v. Conti*, 345 A.2d 238, 245 (Pa. Super. Ct. 1975); A. Leo Levin & Harold K. Cohen, *The Exclusionary Rules in Nonjury Criminal Cases*, 119 U. PA. L. REV. 905, 909 (1971).

In *United States ex rel. Graham v. Mancusi*, 457 F.2d 463, 470 (2d Cir. 1972), the federal court found that even the state appellate court judges had been unable to disregard the prejudicial effect of evidence heard by the trial court. Due process required that the case be remanded

evidence and trial procedure cases.¹² The Court continues "to approve legal rules based upon intuitive assumptions about human behavior that research by psychologists has shown to be erroneous."¹³ Given this approach, the presumption of judicial capacity to disregard prejudicial data most likely will remain vital.

Even if one accepts the conclusion that judges can and do disregard prejudicial evidence in routine civil cases, and perhaps even in criminal cases, strong reasons exist for rejecting that presumption in child abuse cases. First, in the context of child abuse litigation, the issues are particularly laden with emotion. One commentator has stated: "For the average adult, few subjects evoke stronger emotions than children, victimization, and sex. Put the three together to form child sexual abuse, and the stage is set for emotional pyrotechnics."¹⁴ Even psychological professionals have "an almost universal negative reaction and indeed, revulsion towards the child molester."¹⁵

Second, the less well-defined legal standards in child abuse cases promote normative decision-making strongly influenced by individual judges' attitudes, beliefs and values.¹⁶ Abuse cases require judges to make subjective, ad hoc decisions with virtually no legislative guidance.¹⁷ The ultimate standards used to determine "the best interests of the child," whether a child is "undisciplined" or "in need of services," or whether parents are capable of rearing their child "in a proper manner" are overbroad, imprecise and subject to the individual normative predilections of the judge.¹⁸ Many commentators have warned that such

for new trial because the state appellate court could not have been insulated from the improperly admitted evidence. *Id.*

12. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L. REV. 137, 138-39 (1990).

13. *Id.*

14. John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1709 (1990).

15. Diamond, *supra* note 9, at 6.

16. See Rosenberg, *supra* note 10, at 642-43.

17. *Id.*

18. See, e.g., OHIO REV. CODE ANN. § 2151.02.2(c) (Anderson 1990) (defining "unruly child" as one "[w]ho so deports himself as to injure or endanger the health or morals of himself or others"); *Lennon v. State*, 396 P.2d 290 (Kan. 1964) (affirming child dependency determination based on statutory criteria that minor was "without proper care" and mother revealed "lack of moral fiber").

Almost all attacks upon dependency statutes alleging constitutional vagueness have failed. See, e.g., *McGhee v. Moyer*, 60 F.R.D. 578 (W.D. Va. 1973); *In re J.T.*, 40 Cal. App. 3d 633, 115 Cal. Rptr. 553 (1974); *In re D.L.H.*, 253 N.W.2d 283 (Neb. 1977).

One commentator has noted:

[The] term "the best interests of the child" is a rather nebulous and ill-defined standard that opens a plethora of considerations. There have been many attempts by

seemingly unreviewable, unbridled discretion coupled with the presumption that judges will somehow disregard prejudicial data leads to arbitrary, aberrant and unjust results.¹⁹ Ironically child abuse law gives judges even *more discretion* than in other areas to consider evidence determined to be marginally relevant or highly prejudicial, such as raw arrest data.²⁰

Third, the highly normative judicial decision-making in child abuse litigation is exacerbated perhaps to an even greater degree by the cultural biases of trial judges.²¹ Juvenile court judges come from a very narrow segment of society; over ninety percent are white, married males with an average age of about fifty-three years.²² The class and cultural biases of judges are compounded by those of other decision-makers in the child dependency system such as law enforcement officials and social workers.²³ Because most juvenile court judges lack training in sociology and psychology, they rely heavily upon the decisions of social workers.²⁴

courts, not only in California but in other jurisdictions, to attach to that standard some definitive, concrete, and objective terms. Those efforts have failed, for the most part, differing even from case to case. There is still no concrete or definitive standard to which a judge can look when the court must consider the best interests of the child.

Christian Reichal Van Deusen, *The Best Interests of the Child and the Law*, 18 PEPP. L. REV. 417, 419-20 (1991).

19. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 713 (1991); Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Patient*, 103 HARV. L. REV. 1201, 1203, 1216-17, 1231 (1990); Rosenberg, *supra* note 10, at 642; Charles W. Thomas & W. Anthony Fitch, *The Exercise of Discretion in the Juvenile Justice System*, JUV. & FAM. CT. J., Feb.-Mar. 1981, at 31, 31-33.

20. For instance, in *In re Rose Lynn G.*, 57 Cal. App. 3d 406, 129 Cal. Rptr. 338 (1976), the court determined that it was not error for the trial court to have considered an "arrest make-sheet" attached to a probation report because the report was admissible pursuant to statute and because the judge stated that "he would not consider the arrests, as distinct from convictions, as of any evidentiary value." *Id.* at 426, 129 Cal. Rptr. at 350.

One commentator has shown that a judge's attitude affects evidentiary links and inferences and that "some judges may consider evidence of a defendant's juvenile criminal record logically probative of the fact that she is either a victim of circumstance or a born criminal." Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 95 (1984).

21. Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 943-44 (1991). Professor Delgado points out that normativity "hides the person of the judge, who can reason that the decision was compelled by some principle outside himself or herself Normativity arises out of our experiences, not the other way around." *Id.*; see also Frederick Schauer, *The Authority of Legal Scholarship*, 139 U. PA. L. REV. 1003, 1011 (1991) (discussing susceptibility of beliefs to change by persuasion).

22. Kenneth Cruce Smith, *A Profile of Juvenile Court Judges in the United States*, JUV. JUST., Aug. 1974, at 27, 29.

23. See Thomas & Fitch, *supra* note 19, at 31.

24. Michael S. Wald, *State Intervention on Behalf of 'Neglected' Children: A Search for*

Many studies have noted the various class and cultural biases of social workers.²⁵ Thus, a judge's normative bias is compounded by similar biases among social workers.

Fourth, the standard of appellate review in child dependency trials and the non-reviewability of the effect of bias insulate judicial error from reversal.²⁶ The presumption of judicial ability to ignore prejudicial evidence is bolstered by the standard of appellate review. Reversal requires not only that the parent demonstrate that the judge relied on improper prejudicial information, but also that the error was either harmful or created a miscarriage of justice.²⁷ However, the effect of bias is not subject to appellate review, since it remains absent from the appellate record.²⁸ Furthermore, such appellate review would require a careful analysis of the entire trial record, and, as a result of the backlog crisis in the appellate caseload, such in-depth review has become highly unlikely. As a result, courts of appeal will tend to have much less time to determine the actual impact of prejudicial data on a trial court's decision.²⁹ Finally,

Realistic Standards, 27 STAN. L. REV. 985, 1017 n.168 (1975); cf. CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY? 92 (1991) (discussing pros and cons of judicial activism in light of judges' abilities or disabilities to resolve issues). The "inexperienced and incompetent" social workers who rely upon fundamentally flawed empirical instruments when reaching custody decisions exacerbate the problem of judicial bias. Michael S. Wald & Maria Woolverton, *Risk Assessment: The Emperor's New Clothes?*, 69 CHILD WELFARE 483, 484, 503 (1990).

25. *Smith v. Organization of Foster Families*, 431 U.S. 816, 834 (1977); JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 42 (1990); WOLFE, *supra* note 24, at 92; Lorenzo A. Arrendondo et al., *To Make a Good Decision . . . Law and Experience Alone Are Not Enough*, 27 JUDGES' J. 23, 24-25 (1988); Hayman, *supra* note 19, at 1228; Coramae Richey Mann, *Courtroom Observations of Extra-Legal Factors in the Juvenile Court Dispositions of Runaway Boys: A Field Study*, JUV. & FAM. CT. J., Nov. 1980, at 1, 43; Wald, *supra* note 24, at 1001; Wald & Woolverton, *supra* note 24, at 484, 503.

26. For a discussion of the impact of the standard of appellate review, see William Wesley Patton, *It Matters Not What Is But What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency and Parental Severance Trials*, 12 WHITTIER L. REV. 537 (1991) [hereinafter Patton, *It Matters Not*]. On the non-reviewability of bias, see Hayman, *supra* note 19, at 1261 (asserting that responsibilities given to decision-makers in juvenile process is sufficiently fragmented so that they are shielded from moral accountability).

27. *Perry v. State Farm Fire & Casualty Co.*, 734 F.2d 1441, 1446 (11th Cir. 1984); *People v. Saddler*, 24 Cal. 3d 671, 684, 597 P.2d 130, 136-37, 156 Cal. Rptr. 871, 878 (1979); *Brokopp v. Ford Motor Co.*, 71 Cal. App. 3d 841, 854, 139 Cal. Rptr. 888, 895 (1977). For a discussion of judicial error due to bias and the standard of appellate review, see Patton, *It Matters Not*, *supra* note 26, at 541-49.

28. See *supra* note 26.

29. Patricia M. Wald, *Difficult Choices: Coping With a Surging Caseload in the Court of Appeals*, in PROCEEDINGS OF THE FORTY-SEVENTH ANNUAL JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT (reprinted in 114 F.R.D. 419, 545, 576, 582 (1986)) (backlog of cases may lead to decline in quality of appellate decisions); see also Gilbert S. Merritt, *Judges on Judging: The Decision Making Process in Federal Courts of Appeals*, 51

since appellate delay may increase the likelihood of psychological bonding between children and court-appointed foster parents or prospective adoptive parents, natural parents may not regain custody even if reversible error is found.

III. IS THE WHOLE SYSTEM LESS JUST THAN THE SUM OF ITS INDIVIDUAL EVIDENTIARY PARTS?

Assuming that the relaxation of evidentiary rules, the presumption of judicial competence and the appellate deference to trial court rulings substantially minimize the role of evidence rules in child abuse bench trials, the analysis does not stop here. The system's failure to consider the cumulative effect of the myriad evidentiary and procedural changes may be even more problematic. These changes may appear reasonable and fair when analyzed individually, but when cumulated they create a Kafkaesque nightmare.

Several examples point out the potential for inequitable results. First, if parents do not answer depositions, they may suffer admissions and waiver of cross-examination or rebuttal. If they answer, however, the prosecutor in the criminal case gets discovery. Second, parents must rebut presumptions of abuse, even though they often do not have an attorney and may lack the ability to do so on their own.³⁰ Third, parents' ability to inquire into the psychological state of the alleged victim is much more limited than in ordinary civil cases, even though the ultimate issue concerns the child's best interest which in turn may involve questions of the child's psychological health.³¹ Fourth, the traditional rules for cross-examination have been substantially altered so that the accuser will in all probability not be present in court during the examination.³² Fifth, multiple hearsay, evidence of prior bad acts and character evidence normally inadmissible in ordinary civil or criminal trials are all admissible in dependency proceedings.³³ Sixth, if the court orders the parents to cooperate in family reunification therapy, the parents' statements are discoverable by the criminal prosecutor.³⁴

Our Symposium question—does evidence law matter?—cannot be

OHIO ST. L.J. 1385, 1385-86 (1990) (discussing decline in quality of appellate decision-making as result of decisions made without oral argument or publication of written opinions).

30. Patton, *Parallel Lines*, *supra* note 3, at 478 n.20, 480-81.

31. *Id.* at 512 (parents may be prohibited from cross-examining adverse witnesses).

32. *Maryland v. Craig*, 110 S. Ct. 3157, 3171 (1991) (allowing testimony by closed circuit television); *see also* Patton, *Parallel Lines*, *supra* note 3, at 474 n.2 (many states have procedural protections for child victim/witnesses in child abuse prosecutions).

33. Patton, *Forever Torn Asunder*, *supra* note 5, at 337-38, 343-44.

34. Patton, *Parallel Lines*, *supra* note 3, at 483.

answered by focusing on evidentiary rules alone, but must consider those rules in their entire procedural context. For example, it seems rational to create sanctions for failing to answer pretrial depositions in ordinary civil cases because doing so may result in admissions or a waiver of the right to present evidence or cross-examine witnesses on that issue. In contrast, if parents answer pretrial questions in civil child abuse cases, their answers are discoverable by the prosecution in a concurrent or subsequent criminal case.³⁵

Procedural discovery rules in child abuse cases cannot be overlooked when considering the impact of evidentiary rules. For example, in a criminal proceeding, the prosecutor's ability to discover evidence admitted in a related civil child abuse case dramatically increases the stakes of evidentiary presumptions against the parents in civil litigation. When the prosecution presents sufficient evidence that the child's injury would not have been sustained except as a result of intentional abuse or neglect, it establishes the prima facie evidence needed to support the court's jurisdiction over the minor.³⁶ The rationale for this presumption is based on the need for facts which are more likely in the control of one party, similar to the theory of *res ipsa loquitur*.³⁷ But in a civil child abuse case the evidence often involves technical medical data, and given that the parents do not have a constitutional right to trial counsel,³⁸ it is substantially more unfair to shift the burden of proof in this context.³⁹ Moreover, because parents may lose their fundamental right to associate with their child,⁴⁰ the stakes are much higher than in an ordinary civil case where the presumption may appear less onerous.

The burden of this presumption of abuse or neglect becomes more apparent given its consequences in collateral actions. "[I]f the parents

35. See *id.* at 478-79 for a detailed analysis of the procedural and evidentiary problems created by multiple court hearings on child abuse charges.

36. CAL. WELF. & INST. CODE § 355.1 (West 1984 & Supp. 1992) (requiring such findings be based on competent professional evidence); Patton, *Forever Torn Asunder*, *supra* note 5, at 204.

37. Under the theory of *res ipsa loquitur*, a rebuttable presumption of the defendant's negligence arises where the plaintiff presents proof that the instrumentality causing injury was under the defendant's exclusive control and the accident was one which ordinarily does not happen in the absence of negligence. BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

38. See *supra* note 7 and accompanying text.

39. For a discussion of the implications of shifting burdens of proof, see Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 863 (1981); Charles R. Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574, 1585 (1981); Patton, *Forever Torn Asunder*, *supra* note 5, at 303-14.

40. *Moore v. City of Cleveland*, 431 U.S. 494, 504 (1977) (recognizing right of association among members of extended family); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (discussing interest of parent in companionship, care, custody and management of children).

testify to rebut that presumption, in most jurisdictions the criminal prosecutor has a right to the transcripts and may use them either as substantive or impeachment evidence in the criminal trial."⁴¹ Thus, the parents are placed in an intolerable position: if they attempt to rebut the presumption, they help the criminal prosecutor; if they do not testify, they are likely to lose custody of their child.

Another example of this cumulative effect involves the elastic notion of hearsay in child abuse cases. Again, it appears that the need to consider a child's testimony regarding alleged abuse may require a modification of ordinary hearsay rules. Liberal theories of witness unavailability, spontaneous declarations and statements against interest will substantially increase the chances that a child's statements will be admitted in the dependency case.⁴² But when these expansive admissibility rules combine with other evidentiary and procedural rules—the admission of multiple hearsay statements in probation or social worker reports; the parents' lack of a right to counsel; and the requirement that the parents, rather than the proponent, have the duty to subpoena hearsay witnesses for cross-examination—the cumulative effect of these rules is to make it impossible for parents to test the hearsay statements.⁴³

41. Patton, *Parallel Lines*, *supra* note 3, at 481 n.26, 484.

42. Some states have assured that many more child witnesses will be permitted to testify by substantially lowering or eliminating witness competency requirements. *See, e.g.*, ALA. CODE §§ 15-25-31 to -37 (Supp. 1990); UTAH CODE ANN. § 76-5-410 (Supp. 1990); *People v. Vialpando*, 804 P.2d 219, 224 (Colo. Ct. App. 1990) (holding seven-year-old child competent to testify).

For cases detailing the liberalization of hearsay rules in child abuse cases, see *In re Melinda S.*, 51 Cal. 3d 368, 795 P.2d 1244, 272 Cal. Rptr. 787 (1990); *Smith v. State*, 405 S.E.2d 78 (Ga. Ct. App. 1991); *State v. Roman*, 590 A.2d 686 (N.J. Super. Ct. App. Div. 1991); *Villalon v. State*, 805 S.W.2d 588 (Tex. Ct. App. 1991); *State v. Matsamas*, 808 P.2d 1048 (Utah 1991); *In re Dependency of Penelope B.*, 709 P.2d 1185 (Wash. 1985); *In re the Dependency of S.S.*, 814 P.2d 204 (Wash. Ct. App. 1991). *But see Commonwealth v. Dion*, 568 N.E.2d 1172 (Mass. App. Ct. 1991) (holding fifteen-year-old "special needs" student not competent to testify to rape); *Lambert v. State*, 574 So. 2d 573 (Miss. 1990) (holding school nurse's testimony regarding statement of thirteen-year-old rape victim violated hearsay rule).

One commentator has noted that judges "operating without a jury . . . tend to be more liberal in allowing nonexpert and hearsay testimony in an attempt to hear all probative evidence." Elrod, *supra* note 6, at 170.

43. *See In re Malinda S.*, 51 Cal. 3d 368, 375-85, 795 P.2d 1244, 1246-53, 272 Cal. Rptr. 787, 790-97 (1990) (allowing hearsay statements in social worker reports because reports infused with elements of trustworthiness and objectivity); *People v. Manuel M.*, 228 Cal. App. 3d 187, 196-99, 278 Cal. Rptr. 853, 857-59 (1991) (relying on expansive interpretation of witness unavailability in order to admit hearsay statements as declarations against social interest), *depublished by Cal. Sup. Ct.*, No. S020386 (May 22, 1991).

The California court has put a limit on the admissibility of hearsay. In *People v. Gandara*, 233 Cal. App. 3d 1163, 284 Cal. Rptr. 906 (1991), the court held that although Proposition 115 permits the introduction of hearsay in preliminary hearings, it does not permit the introduction of multiple hearsay. *Id.* at 1172-74, 284 Cal. Rptr. at 911-13.

In addition to these changes, the parents' ability to test the hearsay statements has also been altered by a series of cases modifying the procedures for cross-examining children.⁴⁴ The Supreme Court has sanctioned procedures that permit a child witness to testify in a room separate from the defendant, judge and jury. As a result, defense counsel's ability to control evasive or argumentative child witnesses is substantially more difficult. Other common cross-examination trial tactics designed to pressure a witness to tell the truth, such as forcing the witness to testify before prospective impeachment or character witnesses, cannot be used if the child testifies out of court. Further, if defense counsel is in another room cross-examining the child witness, counsel cannot effectively address the jurors and cannot effectively use body language or facial expressions to subtly influence jurors' perceptions of the witness's credibility.⁴⁵ Further, if counsel uses demonstrative or real evidence during cross-examination, their subtle effects would be considerably diminished when viewed by jurors over closed circuit television.

Compare this series of separately rational evidentiary and procedural rulings to individual body parts waiting to be transplanted. Independently each appears normal, but when combined they create a horrible Frankensteinian creature. The resulting body of law does not at all resemble anything remotely similar to traditional notions of fairness.⁴⁶

The myriad changes in the evidentiary and procedural rules that apply in dependency proceedings have reached the point where a single evidentiary ruling, fair and just in theoretical isolation, results in overall unfairness, sacrifices factual accuracy and leads to unwise decisions that often needlessly strip children of their family bonds forever. These results raise the serious question of whether judges can or should consider the cumulative effect of evidentiary and procedural rulings on the overall

44. *Maryland v. Craig*, 110 S. Ct. 3157, 3167 (1990) (holding child's testimony by closed circuit television consonant with Confrontation Clause); *Idaho v. Wright*, 110 S. Ct. 3139, 3150 (1990) (suggesting corroborating evidence to support hearsay statement's trustworthiness not allowed); *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (noting Confrontation Clause provides defendant protections of both physical confrontation of accusers and opportunity for cross-examination).

45. See THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 221-22 (2d ed. 1988) (noting importance of counsel's use of voice inflection to make impact on jury). During cross-examination the jurors are judging the reactions, not only of the witness, but also of defense counsel, the judge and spectators. The cross-examining counsel's attitude and the jury's perception of that attitude are critical. "On cross-examination, [counsel] should be the center of attention Let the jury know your attitude about the facts" *Id.* at 221.

46. See generally Patton, *Parallel Lines*, *supra* note 3, at 496-523, and Patton, *Forever Torn Asunder*, *supra* note 5, at 321-51 for a discussion of the unfairness of waiver of privilege against self-incrimination in child abuse cases.

fairness of a hearing. Do judges have discretion to cure unfairness that falls short of a due process violation?

IV. DO CURRENT EVIDENTIARY THEORIES PROVIDE APPROPRIATE SOLUTIONS?

The previous section analyzed the dilemmas faced by parents in civil child abuse cases where individual evidentiary rulings appear fair until viewed as a functional whole. The cumulative evidentiary effect undermines the overall fairness of that discrete proceeding. In addition, bench trial rulings may substantially prejudice a parent's rights and trial strategy in subsequent or parallel litigation in different courts based upon the same alleged abuse. This section addresses the question of whether current rules of evidence permit trial judges to consider prejudicial effects outside the pleadings to determine the fairness of evidentiary rulings.

The Federal Rules of Evidence and most state evidence codes arguably include sufficiently general language to provide judges with discretion to administer and rule so that the "proceedings [are] justly determined"⁴⁷ and "promot[e] justice."⁴⁸ Judges also have a general power to exclude evidence which presents a danger of unfair or undue prejudice⁴⁹ or which may cause a witness "harassment or undue embarrassment."⁵⁰ But nothing in these evidentiary rules indicates that their drafters considered the problem of how evidentiary rulings in one case may substantially prejudice the rights of parties in other judicial proceedings arising from the same facts.

Inter-system questions, such as the effect of civil child abuse rulings on a subsequent criminal abuse case, require consideration of evidentiary theory in its entire procedural and substantive context. The current mode of analysis does not address these questions. The following examples demonstrate the need for such a comprehensive approach.

In the first example, a father is charged with sexually abusing his daughter in a civil dependency case. Pursuant to an ordinary discovery device,⁵¹ the father moves for a court-ordered psychological examination

47. FED. R. EVID. 102.

48. CAL. EVID. CODE § 2 (West 1966).

49. FED. R. EVID. 403; CAL. EVID. CODE § 352 (West 1966). The dual role of Federal Rule 403 is to promote correct factual determinations "in individual cases and actual and perceived fairness in the judicial process as a whole." *United States v. Robinson*, 544 F.2d 611, 615-16 (2d Cir. 1976) (citing Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 226-30 (1976)), *cert. denied*, 435 U.S. 905 (1978).

50. FED. R. EVID. 611(a).

51. FED. R. CIV. P. 35(a) (establishing that when party's mental or physical condition is in controversy, court may order physical or mental examination of party); CAL. CIV. PROC.

of his daughter. The state's attorney argues that permitting the psychological test will violate the express prohibition against such examinations in criminal trials, and that the state intends to prosecute the father criminally based upon the same alleged child abuse incident.⁵² Can the trial court in the civil case refer to the criminal policies in deciding whether to grant the civil psychological examination? Can the civil dependency judge rule that the limited probative value in the civil case is substantially outweighed by the prejudicial impact in the criminal case or that the probative value is outweighed by broader social concerns, such as discouraging abuse victims from seeking protection and redress or from testifying against the accused in the criminal case?⁵³

CODE § 2032(a) (West Supp. 1991) (allowing discovery by mental or physical examination where mental or physical condition is in controversy). The physical and mental condition of allegedly abused or neglected children is usually at issue in the civil dependency hearing not only to determine whether or not the alleged abuse occurred, but also to determine threshold questions of the court's jurisdiction as well as the best interests of the child at the disposition hearing. See, e.g., CAL. WELF. & INST. CODE § 300(c) (West Supp. 1992) ("The minor is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent . . ."); *id.* § 361.5(3) (West Supp.) (providing that parental rights shall be terminated if child "is removed a second time due to physical/sexual abuse"); *id.* § 366.22(a) (West Supp. 1992) (providing for parental severance if "return of the child after eighteen months of out-of-home placement would create a "substantial risk of detriment to the physical or emotional well-being of the minor."); see also FRANCIS B. MCCARTHY & JAMES G. CARR, JUVENILE LAW AND ITS PROCESSES 235-36 (1989) ("Coercive state intervention should be authorized when a child is suffering serious emotional damage . . .") (citing Task Force on Juvenile Justice and Delinquency Prevention of the National Advisory Committee on Criminal Justice Standards and Goals (1976)).

52. Under the California Penal Code "the trial court shall not order any prosecuting witness, complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility." CAL. PENAL CODE § 1112 (West 1985).

53. In *In re Dolly A.*, 177 Cal. App. 3d 195, 202-03, 222 Cal. Rptr. 741, 745 (1986), the court avoided the problem by classifying civil child dependency trials as analogous to criminal cases and held that the criminal statute prohibited the psychological examination. *Id.*

However, dozens of statutes and cases have clearly held that other criminal evidentiary and legal rules do not apply to dependency actions because they are civil in nature and do not seek to punish parents. See, e.g., CAL. WELF. & INST. CODE § 202(a) (West Supp. 1992) ("The purpose of this chapter [Arnold-Kennick Juvenile Court Law] is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor's family ties whenever possible . . ."); *id.* § 203 (West 1984) ("An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding."); see also *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that minimum constitutionally required burden of proof is clear and convincing evidence since dependency cases do not implicate criminal punishment); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981) (holding that Due Process Clause does not require automatic appointment of counsel for parents because parental severance trials cannot result in criminal sentences).

The second example involves the admissibility of pretrial statements made during negotiation in an alleged case of child abuse. Assume again that the civil child dependency trial precedes the criminal child abuse prosecution. During the negotiation or settlement conference, the parents admit the abuse in exchange for a plea agreement with the state attorney to return custody of their child and set up parenting classes to help the family cure their problems. If the child brings a civil tort action for damages, it is clear that the negotiation statements would be inadmissible regarding liability.⁵⁴ But in some jurisdictions the parents' negotiation statements made in a civil dependency proceeding are admissible, for instance, in the civil disposition hearing⁵⁵ or in a criminal sentencing hearing.⁵⁶ Does the civil dependency judge have jurisdiction to rule that any parental negotiation statements are inadmissible in subsequent cases in different courts? If not, it is unlikely that the best interests of the child will be protected because the parents will be forced to remain silent until the completion of any criminal prosecution, thereby substantially delaying family reunification. Does the civil dependency judge have the discretion to exercise other protective measures such as sealing the parents' statements so that the criminal prosecutor will not have access?⁵⁷ Can

54. FED. R. EVID. 408 ("Evidence of conduct or statements made in compromise negotiations is likewise not admissible."); CAL. EVID. CODE § 1152(a) (West 1966 & Supp. 1992) ("[C]onduct or statements made in negotiation . . . [are] inadmissible to prove . . . liability for the loss or damage or any part of it.").

55. The civil disposition hearing determines the placement of a child after the court has sustained a child abuse petition. Patton, *Parallel Lines*, *supra* note 3, at 483.

56. Julius Libow, *The Attorney's Role During Pretrial Procedures in Juvenile Dependency Court*, 100 L.A. DAILY J. REP., Aug. 7, 1987, at 9, 12. Mr. Libow is a dependency court mediator for the Los Angeles County Juvenile Dependency Court. His article details the dangers parents face from the use of pre-dependency trial statements and statements made during civil dependency plea negotiations.

If the [child abuse or neglect] case does not settle and testimony is taken, the client [parent] can be placed in greater jeopardy. The prosecuting attorney [in the criminal case] has access to juvenile transcripts and may attempt to use a parent's testimony in Juvenile Court for impeachment purposes in criminal court. It also provides more discovery for the prosecuting attorney. . . . The Youth Rights and Dependency Committee of the Los Angeles County Bar is currently working on legislative remedies to affirmatively state that Dependency Court jurisdiction taken on a plea of *nolo contendere* or a submission on documentary evidence not be admissible as evidence in any criminal proceeding.

Id.; see also Patton, *Forever Torn Asunder*, *supra* note 5, at 322-23 (arguing parents' statements and offers to negotiate should not be admissible during jurisdictional hearings to determine whether allegations of child abuse or neglect are true).

57. Under the California Welfare and Institutions Code, the district attorney may participate in child dependency hearings at the request of the juvenile court judge. CAL. WELF. & INST. CODE § 318.5 (West Supp. 1992). It is debatable whether the dependency trial judge can limit the criminal prosecutor's access to dependency data. See Patton, *Parallel Lines*, *supra* note 3, at 504-06 for a discussion of separation of powers and the court's ability to limit prosecutorial discretion. It is clear that more prosecutors are seeking discovery of dependency

the trial court issue a gag order to the state attorney not to disclose the parents' statements to the criminal prosecutor?⁵⁸ Again, the sequence of cases dramatically affects the scope of evidence and substantially compromises the opportunity to realize the goals of conflicting evidentiary policies among the different substantive areas.

V. CONCLUSION

Since the number of fact patterns triggering multiple hearings in different courts is increasing, we must begin to develop new procedures and evidentiary theories to assure cumulative accuracy and fairness in all proceedings. The question of this Symposium—does evidence law matter?—must be answered with a decided “yes.” Even if we discount the role of evidence rules in bench trials because of liberal admissibility theories, the presumption of judicial capacity and appellate court deference, evidence law still must play a vital role because a court's rulings can dramatically affect the strategy and results of subsequent jury trials based upon the identical facts.

statements and that the percentage of civil child dependency cases which are also criminally investigated has been increasing dramatically during the past decade. In Los Angeles County there was a 238% increase from 1980 to 1984. From 1987 to 1989 the various Los Angeles prosecutorial agencies realized additional increases between 6% and 41%. Patton, *It Matters Not*, *supra* note 26, at 539 n.7.

58. Whether the court can issue a legal and sufficient gag order between government attorneys is an open question. *See, e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 604 (1976) (suggesting court would have power to control release of information by officers of court). *But see In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979) (stating attorneys free to alert public and press of discovered documents). Courts have disagreed whether erecting a “Chinese Wall” between individual prosecutors in different branch offices, instead of disqualifying the entire prosecutor's office, is a required remedy when protected facts have been disclosed. *See, e.g.*, *United States v. Borello*, 624 F. Supp. 150, 152-53 (E.D.N.Y. 1985) (requiring neither “Chinese Wall” nor disqualification where prosecution affirmatively proves independent source of facts at issue); *People v. Wyatt*, 530 N.Y.S.2d 460, 461-62 (Crim. Ct. 1988) (holding disqualification of district attorney's office proper where erection of “Chinese Wall” not acceptable); *State v. Stenger*, 760 P.2d 357, 360-61 (Wash. 1988) (holding prosecuting attorney disqualified where defendant had sought attorney's counsel on matters related to offense); *cf.* Glenn S. Kaplan, *Chinese Walls: A New Approach*, 15 J. LEGAL PROF. 63, 64-68 (1990) (discussing attorney representation of adverse interests and finding that courts take flexible approach to disqualification of law firms representing adverse interests where risk of harm is low).

