

Finding Facts and Making Judgments

*Hon. Jack B. Weinstein**

Thank you for this Wigmore Award my friends, and especially you, Professor Margaret Berger—student, colleague, and mentor—and for over-honoring me, even at a risk of undermining your own credibility.

Fifty-five years ago, I was delivered from private practice and deposited on Mount Olympus at Columbia Law School. Almost immediately, because of the untimely death of Professor Jerome Michael, I was thrown unprepared into the Evidence class, fighting to stay a half page ahead of my students.

The wonderful multi-volume third edition of *Wigmore on Evidence* sat behind my desk. Almost every page had my yellow reminder slip. It looked like it had developed a fungus infection. Gradually, I pulled a few pages ahead of the students.¹

Then I was made a judge. After my eight o'clock Evidence class, I would drive to court with students, warning them on the way that it was what I said at Columbia—not what I did in court—that counted on their law school exam. A hearsay objection? Don't be absurd! The jury and I wanted to know all we could about these fascinating people and events.² And now, with x-ray scans and neurological research revealing how people's minds work, scientific proof that we're all unconsciously biased by reliance on stereotypes (as if we didn't know), DNA, genetics, the Internet and e-mail evidence, sophisticated statistical quantifications and probability estimates, *Daubert* problems, and other esoteric aspects of our craft, I'm falling further behind. Fortunately, each year's new law clerks, who have been

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¹ Things have perhaps become a bit easier with the advent of the Federal Rules of Evidence. See Jack B. Weinstein, *Is There Scholarship After Death, or Are Evidence Teachers Needed After the Federal Rules?*, 41 MD. L. REV. 209 (1982).

² My attempts to legitimize curiosity by abolishing the rules of hearsay ultimately failed to infiltrate the Federal Rules of Evidence. See Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).

trained so well by evidence scholars, and the wonderful law review articles I read with such anticipation provide hope for comprehension of continuing problems of proof.

EVIDENCE'S THIRD DIMENSION—THE NORMATIVE

Evidence teachers have rightly instructed their students that a trier—whether the judge or jury—is to determine the probability that facts existed in the real world: evidence is evaluated and then combined in a logical progression of inferences with evidential hypotheses to determine whether propositions of fact (operative facts) required by the rule of substantive law have been established to the requisite degree of probability. Rational fact-finding rules the day.³

Much as we try to constrain our judicial inquiry into the facts by logic in the quiet confines of our courtrooms, we fail, in part for reasons suggested by Carl Sandburg:

“Do you solemnly swear before the ever-living God that the testimony you are about to give in this cause shall be the truth, the whole truth, and nothing but the truth?”

“No, I don't. I can tell you what I saw and what I heard and I'll swear to that by the ever-living God but the more I study about it the more sure I am that nobody but the ever-living God knows the whole truth and if you summoned Christ as a witness in this case what He would tell you would burn your insides with the pity and the mystery of it.”⁴

³ See, e.g., JEROME MICHAEL & MORTIMER J. ADLER, *THE NATURE OF JUDICIAL PROOF: AN INQUIRY INTO THE LOGICAL, LEGAL, AND EMPIRICAL ASPECTS OF THE LAW OF EVIDENCE* (1931); EDMUND M. MORGAN & JOHN M. MAGUIRE, *CASES ON EVIDENCE* (1934) (a revision of the 1900 second edition of Thayer's Evidence Casebook); JAMES BRADLEY THAYER, *SELECT CASES ON EVIDENCE AT THE COMMON LAW I* (1892) (“Reasoning, The Rational Method of Settling Disputed Questions . . .”); WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985); JACK B. WEINSTEIN ET AL., *EVIDENCE, CASES AND MATERIALS* 3, 11–14 (9th ed. 1997) (analysis of lines of proof); JOHN HENRY WIGMORE, *THE PRINCIPLES OF JUDICIAL PROOF: OR THE PROCESS OF PROOF AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS* (2d ed. 1931); Margaret A. Berger, *Science for Judges IX*, 16 J.L. & POL'Y 13 (2007) (summary of Science for Judges' program papers); Jerome Michael & Mortimer J. Adler, *The Trial of an Issue of Fact*, 34 COLUM. L. REV. 1224, 1462 (1934); D. Michael Risinger, *Introduction*, 38 SETON HALL L. REV. 835 (2008); Peter Tillers, *Visualizing Evidence and Inference in Legal Settings*, 6 LAW, PROBABILITY & RISK 1 (2007); William Twining, *Argumentation, Stories, and Generalizations: A Comment on Prakken et al. "Sense-Making Software"*, 6 LAW, PROBABILITY & RISK 169 (2007).

⁴ CARL SANDBURG, *THE PEOPLE, YES* 193 (1936), quoted in Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 240 (1966).

While the difficulties of estimating the probability that an operative fact existed are properly emphasized in our classrooms, less often stressed is the lack of stability of the law that defines operative facts and therefore our factual inquiries. Since I shall merely touch on the point, it is enough to say here that there is a difference between triers' finding facts and their making judgments about what the substantive law is or should be. The issue is obvious in such matters as negligence, capital punishment, sex crimes and pornography, gender discrimination, and punitive damages. Local community views impinge upon—and manipulate—substantive commands, sometimes with the law's approval, and sometimes with its disdain, as when we denominate the process "nullification." The subtle impact of normative judgments affecting the law in particular cases continues to pervade our trials, arbitrations, and settlements.

In a recent case in my court, the matter was starkly posed when a middle-aged, otherwise blameless peaceful citizen, who had been terribly sexually abused as a child but created his own supportive family, was discovered through Internet forensics to be viewing child pornography in a private locked room of his detached garage. The minimum statutory penalty was five years. After a guilty verdict, the jury was informed of the mandatory penalty. Jurors then indicated that they believed the crime warranted treatment rather than incarceration, and that a guilty verdict would probably not have been rendered had they known of the punishment.⁵ Of necessity, the resulting opinion, granting a motion to set aside the verdict, deals with an analysis of colonial juries' power to decide sentences and impose *local* community views—the stuff of *Booker*.⁶ Yet the overall trend, led by the Supreme Court, is reducing the community's input into rules of law as applied in court by attenuating the jury's role.⁷ Capital cases and some non-capital sentencing are perhaps exceptions. But, in fact, biases, community views of equities, and a humane view of life in all its wonderful and awe-inspiring complexities, still intrude. Triers make judgments about fairness while they act as factfinders. Do our students appreciate this fascinating third dimension of Evidence? Do the Sixth and Seventh Amendments to the Constitution still guaran-

⁵ United States v. Polizzi, __ F. Supp. 2d __, No. 06-CR-22, 2008 U.S. Dist. LEXIS 26223 (E.D.N.Y. April 1, 2008, revised April 23, 2008).

⁶ United States v. Booker, 543 U.S. 220 (2005). Colonial history and practice is also the basis for *Crawford v. Washington*, 541 U.S. 36 (2004).

⁷ Jack B. Weinstein, *The Role of Judges in a Government of the People, by the People and for the People*, 30 CARDOZO L. REV. (forthcoming 2008) (see Part VIII, Juries).

tee the people's oversight of the courts through juries—the equivalent of voters exercising supervision over the other branches of government? I leave you with these questions that trouble me.