

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1997

The In/Into Controversy: Lubet Misses the Point

J. Alexander Tanford

Indiana University Maurer School of Law, tanford@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Criminal Procedure Commons](#), and the [Evidence Commons](#)

Recommended Citation

Tanford, J. Alexander, "The In/Into Controversy: Lubet Misses the Point" (1997). *Articles by Maurer Faculty*. Paper 568.
<http://www.repository.law.indiana.edu/facpub/568>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

THE IN/INTO CONTROVERSY: LUBET MISSES THE POINT

*J. Alexander Tanford**

In his controversial article "Into Evidence,"¹ Steve Lubet bemoans the fact that all Trial Advocacy professors essentially agree with each other. This lack of professional controversy, he asserts, makes us all wretched.² In this, his latest attempt to foment controversy,³ Lubet argues that exhibits are admitted *into* evidence, rather than *in* evidence.⁴ Although I agree with him on both counts, I don't see why that should stand in the way of a good argument. The problem with his thesis is that he has completely missed the point.

Lubet's article is a post-modern critique of Peter Murray's infamous footnote, in which Murray asserts that evidence is not a place but a status.⁵ Lubet attacks this formalist view through deconstruction, using the tool of grammatical analysis borrowed from the faddish law-and-literature movement. Unfortunately, Lubet gets so caught up in this intellectual exercise that he fails to see the forest for the trees. He overlooks the central flaw of Murray's footnote: When used in the context of exhibits, "evidence" is *neither* a place nor a status, it is a euphemism for "the record." Once we agree on that, then it is obvious that information (such as an exhibit) is placed *into* the record; hence, into evidence. Lubet thus commits the cardinal sin of scholarly discourse—he is right but for the wrong reason!

Let us examine the issue further.

The primary source of the problem is, of course, the ambiguity of meaning.⁶ What is "evidence"? Until this question is answered, it is pointless to explore the in/into question. Unfortunately, evidence is not defined in the Federal Rules of Evidence. Indeed, the drafters of

* Professor of Law, Indiana University School of Law.

¹ Steven Lubet, *Into Evidence*, 81 CORNELL L. REV. 154 (1995).

² I am writing this while watching 21 videotaped final trials in which *not a single student* was able competently to get an exhibit either in or into evidence. I am not at all sure it is the lack of professional controversy that makes us this way.

³ See Lubet, *supra* note 1, at 155 n.12, in which he cites a number of his previous articles in a shallow ploy designed to improve his citation count.

⁴ Or the other way around; I'm not quite sure.

⁵ PETER L. MURRAY, BASIC TRIAL ADVOCACY 14 n.1 (1995).

⁶ See DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE (1989) (likely sounding book picked at random from library catalog).

the Federal Rules of Evidence appear to have tried deliberately to obfuscate this issue by writing incomprehensibly and butchering the English language whenever possible. For example, the Rules refer to "the right of a party to introduce before the jury evidence."⁷ Turning to Black's Law Dictionary,⁸ we find no help there either. It defines evidence as a "species" of proof, which suggests that evidence is neither status nor place, but some kind of living thing.

A second problem is that "there's law on both sides." Take the Federal Rules of Evidence.⁹ They were drafted by a committee, and therefore try to placate both the "in" and the "into" schools. Rule 612 provides that if a writing is used to refresh memory "an adverse party is entitled . . . to introduce *in* evidence those portions which relate to the testimony of the witness." Rule 803(5), however provides that if this same writing is used as a record of past recollection, it "may be read *into* evidence." Similarly, Rule 703 provides that data relied on by an expert "need not be admissible *in* evidence," while Rule 803(18) provides that if this same data is contained in published treatises or periodicals, "the statements may be read *into* evidence."

Case law also goes both ways. A Westlaw¹⁰ search of federal appellate court opinions reveals that 15,622 cases prefer the phrase "into evidence," 16,801 use the phrase "in evidence," and a staggering 4437 use both phrases in the same opinion.¹¹

One solution has been offered by the Indiana state courts. Simply eliminate the problem by declaring that exhibits are not admissible at all! In *Springer v. State*,¹² the Indiana Supreme Court held:

Appellant next contends that the trial court erred by admitting into evidence a certain knife which was State's exhibit 8. . . . Wagner testified that exhibit 8 was "exactly like" the knife Appellant used to stab him. The knife used by Appellant in his attack was referred to repeatedly throughout Appellant's trial. Photographs were introduced to show the knife wounds caused by Appellant and Wagner showed the resulting scars. The State . . . argues that State's exhibit 8 was demonstrative evidence . . . and therefore was admissible. We do not agree. . . . *Although*

⁷ FED. R. EVID. 104(e); *see also* FED. R. EVID. 104(b): "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

⁸ They made me buy BLACK'S LAW DICTIONARY when I was a 1-L in 1973. I have never actually used it for anything.

⁹ Please!

¹⁰ My trial practice book is published by the Michie Company which owns LEXIS, Westlaw's competitor. However, out of courtesy to my publisher, which would surely prefer not to be associated with this article, I ran the search on Westlaw.

¹¹ I really ran this search. I did not, however, actually read any of the cases. Reading cases is not necessary in modern legal scholarship. See any recent issue of the Harvard, Yale, or Stanford Law Review.

¹² 463 N.E.2d 243 (Ind. 1984).

*the trial court could have allowed exhibit 8 to be used at trial . . . the trial court should not have formally admitted exhibit 8 into evidence.*¹³

A better solution is to abandon the outdated notion that exhibits begin outside the realm of evidence and end up inside it. Our starting point is again the Federal Rules themselves. The Rules never say that exhibits are admissible in or into evidence. Indeed, when exhibits and admissibility arise, the language is surprisingly reminiscent of the Indiana opinion. Rule 803(18) provides that if learned treatises are admitted, they “may *not* be received as exhibits.” Likewise Rule 803(5), which states that a record of past recollection “may be read into evidence but may not itself be received as an exhibit.”

The need to redefine exactly what kind of thing/status exhibits are being admitted in/into, is made even more obvious when one considers the linguistic ramifications of failing to do so. Consider Rule 404(b), which addresses “evidence [the prosecution] intends to introduce at trial.” If the Lubet/Murray thesis¹⁴ were correct, this phrase would effectively read: “*evidence* [the prosecution] intends to introduce in/into *evidence*”—an obvious redundancy and a disfavored grammatical construction. How can evidence be introduced in/into evidence? If it is evidence to begin with, it cannot be introduced in/into itself—it is already there.¹⁵

Once we abandon the idea that the end product of introduction is evidence, what exactly is evidence introduced in/into? The solution, as always, lies with Wigmore. Wigmore’s treatise is appropriately referred to as the Bible of Evidence—if you look hard enough, you can find support in it for any proposition.¹⁶ Wigmore doesn’t mess around with trivial concepts like exhibits—he gets right to the heart of the matter: we’re talking here about “autoptic proference!”¹⁷ As Wigmore himself states:

¹³ *Id.* at 245-46 (emphasis added). Given the court’s holding, its decision to use the phrase “into evidence” can only be considered dicta—or is it dictum?

¹⁴ For those who have lost the thread, Murray and Lubet are engaged in a scholarly disagreement about whether exhibits are admitted in or into evidence.

¹⁵ A similar redundancy appears in the juxtaposition of FRE 103(b), which speaks of the “character of evidence,” and 404(a) which mentions “evidence of character.” Does this mean that an offer of proof under Rule 404 would have to show the *character of the evidence of character*? I should think not!

¹⁶ *E.g., compare* 5 WIGMORE ON EVIDENCE § 1367 at 32 (cross-examination is the greatest legal engine ever invented for the discovery of truth) *with* 1 WIGMORE ON EVIDENCE § 8 at 237 (cross-examination is the most “efficacious expedient” ever invented for the creation of false impressions).

¹⁷ Book I, Part I, Title III of WIGMORE ON EVIDENCE, which covers “real” evidence such as in-court experiments, weapons, bloody clothes, photographs, liquor sampled by jurors, the conduct of insane people, and jury views, is entitled “Autoptic Preferences.” Interestingly, this phrase has actually appeared in several appellate opinions, although not always in particularly helpful ways. See the pithy insight of *Rich v. Ellerman & Bucknall S.S. Co.*, 278 F.2d 704, 708

The three modes by which a tribunal may properly acquire knowledge for making its decisions . . . are Circumstantial Evidence, Testimonial Evidence, and "Real" Evidence. . . . If, for example, it is desired to ascertain whether the accused has lost his right hand and wears an iron hook in place of it,¹⁸ one source of belief on the subject would be the testimony of a witness who had seen the arm; in believing this testimonial evidence, there is an inference from the human assertion to the fact asserted. A second source of belief would be the mark left on some substance grasped or carried by the accused; in believing this circumstantial evidence, there is an inference from the circumstance to the thing producing it. A third source of belief remains, namely the *inspection by the tribunal* of the accused's arm. This source differs from the other two in omitting any step of conscious inference or reasoning, and in proceeding by direct self-perception, or autopsy. . . . [F]or the purposes of judicial investigation, a thing perceived by the tribunal as existing *does* exist. . . . [W]e are here concerned with nothing more than matters directly perceived — for example, that a person is of small height¹⁹ or is of dark complexion; as to such matters, the perception by the tribunal that the person is small or large, or that he *has* a dark or a light complexion, is a mode of acquiring belief which is independent of inference from either testimonial or circumstantial evidence. It is the tribunal's self-perception, or autopsy, of the thing itself.

From the point of view of the litigant party furnishing this source of belief, it may be termed *Autoptic Proference*.²⁰

It follows that, as soon as the jurors see an exhibit with their own eyes, it has become part of the evidence they will consider²¹ in reaching a verdict. The exhibit becomes evidence at this very moment of

(2d Cir. 1960) ("Autoptic proference is always proper, unless reasons of policy apply to exclude it.").

¹⁸ Was this a major problem in Wigmore's day? I ran another Westlaw search, and found no cases in which anyone cared whether the accused had lost his hand and had it replaced with an iron hook.

¹⁹ An interesting turn of phrase. Perhaps Wigmore's manual of style omitted the section on oxymorons.

²⁰ 4 WIGMORE ON EVIDENCE § 1150 at 322. Neither the word "autoptic" nor the word "proference" appears in the AMERICAN HERITAGE DICTIONARY (3d ed. 1992). Wigmore made them up, noting somewhat opaquely that autoptic came from "autopsy," and proference derived from the Latin *proferre*, "whose form 'profer' is intimately associated, in history and principle, with the process of autoptic proference." *Id.* n.1. He did not further elaborate on this intimate association. In any event, the dictionary suggests that the correct adjectival form of autopsy would be "autopsic," not autoptic, and spells proffer with two f's, not one. It also points out that "proffer" is already a noun (*e.g.*, the proffer of evidence), so there is no reason to add the redundant "-ence" to make it into a noun. Technically speaking, Wigmore's word "proference," even if correctly spelled, would mean "*the act of the act of bringing something forth.*" The redundancy section also appears to have been missing from Wigmore's style manual.

²¹ That is, they will reject it along with other credible evidence, in order to decide the case based on their pre-conceptions and/or messages received from God. *See United States v. John DeLorean* (acquitted).

autoptic proference! To speak further about entering the exhibit in/into evidence is meaningless—it is already there.²²

What is left? Once the exhibit has become evidence, the only question remaining is, What happens to evidence when it has served its primary purpose? The answer is obvious: it becomes part of the record. For example, Indiana Rule of Appellate Procedure 7.2 states: “The record of the proceedings shall consist of . . . [t]he transcript of the evidence . . . [e]xhibits [and] physical objects.” As every trial lawyer knows, the whole reason we bother to call witnesses and offer exhibits is to prepare a record for appeal. It is pointless to do this for trial purposes, because the jurors already have made up their minds based on what they heard at the laundromat months before the trial even started.

Thus, it is plain to see that Lubet is right in pointing out that Murray is wrong. Evidence is not a status *in* which exhibits are admitted.²³ However, it is also plain that Lubet is wrong himself when he asserts that evidence is a place *into* which exhibits are introduced. When used in the context of exhibits, “evidence” is *neither* a place nor a status, it is a euphemism for “the record.” Since a record containing exhibits is customarily sent to the court of appeals in a box, it is obvious that exhibits are placed *into* that box; hence “into” the record. I hope this puts the issue to rest.

²² See RICHARD REGVALD, *HEIDEGGER ET LE PROBLEME DU NEANT* (1987); DAVID K. COE, *ANGST AND THE ABYSS: THE HERMENEUTICS OF NOTHINGNESS* (1985); JEAN PAUL SARTRE, *BEING AND NOTHINGNESS; AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY* (Hazel E. Barnes trans., 1968).

²³ Besides, if evidence were a status, wouldn't exhibits be admitted *to* evidence, as Mother Theresa will someday be elevated *to* sainthood?